UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

VALLEY HOSPITAL MEDICAL CENTER, INC.
d/b/a VALLEY HOSPITAL MEDICAL CENTER

and Case 28-CA-234647
28-CA-235104
28-CA-235516
28-CA-236168
28-CA-236170
28-CA-236171
28-CA-240010
28-CA-252017
28-CA-256493

CULINARY WORKERS UNION, LOCAL 226
a/w UNITE HERE INTERNATIONAL UNION

and Case 28-CA-238396

SHIRRILL SMITH, an Individual

*Noor I. Alam*, *Fernando J. Anzaldua*, and
*Nestor M. Zarate-Mancilla, Esqs.,*
for the General Counsel.
*Luke Dowling* and *Sarah Varela, Esqs.,*
for the Charging Party.
*Thomas H. Keim, Jr., Esq.,* for the Respondent.

# DECISION

## INTRODUCTION

AMITA BAMAN TRACY, Administrative Law Judge. In approximately March 2018, Valley Hospital Medical Center's new in-house management team began supervising the housekeeping, linen, and dietary staff who have been represented by the Culinary Workers Union, Local 226 since at least 2013. Also, since 2016, Valley Hospital Medical Center and the Union had been negotiating a new collective-bargaining agreement after expiration of the prior agreement. With this backdrop, the General Counsel argues that numerous actions by the new management team in 2018 and 2019 were tainted by antiunion and protected concerted activity

animus. The evidence shows, however, that the General Counsel failed to prove many of the complaint allegations, including several employee discharges. Instead, the evidence shows that the new management team sought to correct numerous performance and conduct deficiencies in the workplace. Moreover, the General Counsel relies upon the prior litigation history of Valley Hospital Medical Center which did not involve the Culinary Workers Union, Local 226 or the same management team. The General Counsel sought to impute these prior unlawful acts on the current management team, but the evidence does not support this theory.

## STATEMENT OF THE CASE

This case was tried by videoconference from March 1–3, 8–24, 2021.[1] The Culinary Workers Union, Local 226 a/w Unite Here International Union (the Union) and Shirrill Smith (Smith) filed several unfair labor practice charges between January 2019 and July 2020 against Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center (Respondent), alleging violations of Section 8(a)(1), (2), (3), (4), and (5) of the National Labor Relations Act (the Act).[2] An amended third consolidated complaint and notice of hearing was issued on February 1, 2021.[3] Respondent filed a timely answer, denying all material allegations.

The amended third consolidated complaint alleges that Respondent violated the Act by threatening employees with closer supervision, discipline, and/or discharge for engaging in union and/or protected concerted activities; denying employees the right to a union representative; undermining the union and making statements of futility; orally promulgating and maintaining overly broad rules regarding speaking with union stewards, employee dress code, and distributing flyers; interrogating employees about their and other employees' union and/or protected, concerted activities; creating an impression of surveillance regarding employees' union and/or protected concerted activities; directing employee to form and participate in a committee to deal with working conditions; making unilateral changes to employees' working conditions; disciplining, closely supervising and increasing work assignments for employees who engaged in union and/or protected concerted activity; restricting union stewards access to the facility; restricting and prohibiting access for a union representative at the facility; and discharging the union shop steward due to her support for the union. The specific allegations will be detailed within this decision.

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[1] On February 5, 2021, I issued an order directing that this trial be conducted by videoconference due to the ongoing Coronavirus Disease 2019 (Covid–19) pandemic. At the start of the hearing, Respondent objected to conducting the trial by videoconference (Transcript (Tr.) 13–14). However, I overruled the objection for the reasons set forth in the February 5, 2021 order. The videoconference hearing did have several audio problems including announcements over a loudspeaker, fire alarms, and barking dogs during witness testimony as well as problems with internet connections.

[2] The Union filed the unfair labor practice charge in Case 28–CA–234647 on January 22, 2019; Case 28–CA–235104 on January 29, 2019; Case 28–CA–235516 on February 4, 2019; Case 28–CA–236168 on February 15, 2019; Case 28–CA–236170 on February 15, 2019; Case 28–CA–236171 on February 15, 2019; Case 28–CA–240010 on April 18, 2019; Case 28–CA–252017 on November 15, 2019, and amended on November 19, 2019; Case 28–CA–256493 on February 14, 2020; and Case 28–CA–263009 on July 14, 2020. Smith filed the unfair labor practice charge in Case 28–CA–238396 on March 22, 2019.

[3] In the posthearing brief, counsel for the general counsel (CGC) withdrew complaint pars. 5(v), 5(w), 5(x), 7(a)(3), 7(a)(9), 7(c)(6), and 12. This brief also references a withdrawal of complaint par. 5(b)(13) which does exist but indicates a withdrawal of unlawful discipline by Respondent of Ruiz in October 2018 which is at complaint par. 7(b)(13), which I will consider withdrawn by the General Counsel.

On the entire record,[4] including my observation of the demeanor of witnesses,[5] and after considering the 207-page brief filed by the counsels for the General Counsel (CGC) and 28-page brief filed by counsel for Respondent,[6] I make the following

## FINDINGS OF FACT AND LEGAL ANALYSIS

### I. JURISDICTION

At all material times, Respondent has been a corporation with an office and place of business in Las Vegas, Nevada, operating an acute care hospital (the facility) providing medical care, and is owned and operated by Valley Health System (VHS), a subsidiary of Universal Health Services, Inc. (UHS). In conducting its operations during the 12-month period ending January 22, 2019, Respondent admits having purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Nevada, and derived gross revenues in excess of $250,000. Thus, Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act. Furthermore, Respondent admits, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

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[4] The transcripts and exhibits in this case generally are accurate, but there are several misspellings within the transcript.

[5] I note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all–or–nothing propositions—indeed nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Careful consideration has been given to the way testimony was solicited by counsel. Less weight will be given to testimony of nonadverse witnesses about disputed matters that were solicited by counsel on direct examination through leading questions, especially when there was no demonstrated or apparent need to refresh the witnesses' memory. See Federal Rules of Evidence 611(c), Advisory Committee Notes; *ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 (2019). I will set forth specific credibility resolutions within the findings of fact.

[6] Other abbreviations used in this decision are as follows: "GC Exh." for the General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief. While CGC and counsel for Respondent filed posthearing briefs, these briefs were problematic. CGC's brief contained numerous missing words or phrases, incorrect citations to the complaint paragraphs for withdrawal as well as incomplete sentences where the attorneys sought to include additional information but left these out with notations of "XXX" (Tr. 126, 128, 129, 170). This brief did not appear complete or edited. Counsel for Respondent's brief did not address half of the allegations in this complaint; these allegations were litigated but not argued. Litigation does not end when the record closes. Rather as important as the hearing is the posthearing brief. The posthearing brief should be where counsels "make their case" where the evidence and case law are analyzed and argued as favorable to their side while also pointing out weaknesses in the argument of the other side. Here, both CGC and counsel for Respondent missed the mark in their posthearing briefs.

## II. ALLEGED UNFAIR LABOR PRACTICES

After uncontested background facts, I set forth my factual findings and legal analysis including credibility determinations for each of the unfair labor practice allegations enumerated in the General Counsel's consolidated amended complaint.

In this matter, no one witness stood out as inherently reliable or highly credible. Perhaps the passage of time made their collective testimony mediocre with their memories recalling some events and not others. Thus, I do not rely upon any one witness in these findings of facts. Instead, I rely upon some portions of a witness's testimony. I rely considerably on the contemporaneous documentary evidence created during these events. These include investigatory notes and emails.

I will discuss McKinnon's credibility now as he was involved in almost all allegations in this complaint. Overall, for Respondent, McKinnon provided consistent testimony throughout his considerable time under examination. At times, McKinnon would not answer questions directly, and instead would offer hypothetical responses. Furthermore, understandably, McKinnon appeared uncomfortable and evasive when answering questions about the harassment claims made against him. Most of McKinnon's disciplinary decisions were supported by documentary evidence as well as contemporaneous notes and his consistent testimony. While McKinnon's management style clearly was different from the style of the prior third-party management team, this style has no bearing on his credibility during this hearing. Moreover, I did not find any allegations of inappropriate conduct by McKinnon to affect his credibility. While the General Counsel would argue that any claims of inappropriate conduct should automatically be believed and thus lead to the discrediting of McKinnon's testimony, I disagree. I instead rely upon McKinnon's testimony when corroborated by other witnesses and the documentary evidence. There are several instances though where I do not credit McKinnon's testimony such as when his testimony is not supported by documentary evidence or contradicted by corroborating witnesses. McKinnon may not have the personality and demeanor that meshes with the EVS department employees, but such personality traits do not make him unbelievable. To the contrary, McKinnon, and the other managers' documentation of employees' performance issues was detailed and thorough which makes their testimony more credible than not.[7]

As for the other EVS managers, Blake provided somewhat consistent testimony, but he could not recall all events at issue in this matter. Furthermore, his memory was not as sharp as McKinnon's memory as he confused various meetings. Cox provided candid, truthful testimony. Millet provided the weakest testimony amongst the managers since he could not recall details from 2018 and appeared nervous. However, with all of Respondent's witnesses, I rely upon their testimonies to the extent they are consistent with their contemporaneous documentation. Finally, concerning the two human resources witnesses, Irwin and Thorne, their memories to events they should have recalled appeared unclear at times. I credit their testimony on occasions but not fully.

[7] CGC, in the posthearing brief, added a footnote that McKinnon formerly worked for Station Casinos at its Santa Fe and Texas Station locations, which are the subject of current NLRB litigation (GC Br. at 32 fn. 9). Citing to other NLRB litigation to which McKinnon was not involved to impugn his credibility, if that was CGC's intention, is unpersuasive and improper.

### *A. Overview of Respondent's Organization, including the Environmental Services and Dietary Departments*

Respondent's facility consists of five patient floors along with a basement. During the relevant time, Claude Wise (Wise) served as the chief executive officer, Chad Silver (Silver) served as the chief operating officer,[8] Jeanne Schmid (Schmid) served as UHS vice president of labor relations, Wayne Cassard (Cassard) served as market director, human resources, Kyle Sprague (Sprague) served as director of facilities, and Dana Thorne (Thorne) served as director of human resources.

Thorne, who has been in her position for 16 years, oversees the human resources functions at Respondent including performance appraisals, compensation, employee morale, employee counseling, maintenance of human resources records including disciplinary records as well as the administration of the three collective-bargaining agreements (Tr. 141, 1845–1846). Human resources generalist Leslie Irwin (Irwin) reports to Thorne (Tr. 141–142, 1832). Irwin is assigned to work with the director and managers who must abide by the collective-bargaining agreement, now expired, between the Union and Respondent. Irwin provides general advice and guidance to these managers (Tr. 150, 216, 1832). Irwin also handles employee complaints and participates in the grievance process (Tr. 1833–1834). Each employees' physical personnel file with any original copies of disciplinary actions is kept in secured filing cabinets in the human resources office while an electronic copy is maintained in the human resources information services (HRIS) department (Tr. 1847, 1860, 1884, 1920–1923).

Respondent issues four levels of discipline to employees provided by the parties' expired collective-bargaining agreement. The progressive discipline is as follows: level 1 preventative counseling, level 2 written warning, level 3 final warning, and level 4 termination.[9] Respondent's disciplinary form notes that final written warnings and terminations require approval from human resources prior to discussion with employee.[10] Thorne signs all levels of disciplinary actions which indicates that she has reviewed the disciplinary action to ensure that all pertinent documents are included but she does not investigate the actual incidents (Tr. 149, 1863–1864). As for level 4 disciplinary actions, Thorne testified that she approves terminations after reviewing the documentation and has conversations with the managers involved but she does not verify the accuracy of the investigatory documents (Tr. 286, 1899–1900).[11] Thorne stated that she looks at all the circumstances such as the employee's disciplinary history to determine whether termination is appropriate (Tr. 1952). Thorne also ensures that the managers have spoken to the employees to get their version of the events (Tr. 1953). Finally, Thorne

[8] Silver is no longer employed by Respondent.

[9] A documented conversation is when a manager has a conversation or coaching with an employee; this documented conversation is different from a level 1 preventative counseling (Tr. 312–313, 380). A preventative counseling may not be grieved.

[10] Blake testified that human resources must approve final written warnings and terminations (Tr. 289).

[11] The parties stipulated that Thorne has no knowledge of the authenticity or veracity of any of the disciplines entered into the record as R. Exhs. 92 through 112. Thorne received these documents as physical paper copies which were included as part of a paper packet with attached corrective action forms. She does not know who created the attached documents, when they were created, how they were created, or if they are what they appear or purport to be.

testified that although not required, she generally keeps Wise informed of any terminations (Tr. 1900).

Any attendance issues are addressed in the parties' expired CBA at article 15.02 (GC Exh. 4). The attendance policy is based on an 8-point system, and any accrual of 8 points in a rolling 12-month period results in termination. Moreover, employees are required to call in at least 4 hours prior to the start of the shift if they will be absent or late. If these call-in procedures are not followed, progressive discipline will result, as described above. Points do not accumulate for approved leave under the Family Medical Leave Act (FMLA) but employees who have been approved for intermittent leave under FMLA must still follow proper call-in procedures for each shift. Respondent uses third-party administrator, Sedgwick, to approve FMLA leave, either in a block of time or to be used intermittently during a set period (Tr. 159–160, 230–231). If Sedgwick approves an employee's request for FMLA leave, Respondent's human resources would communicate with the managers about the approval (Tr. 77–78, 237). Thorne testified that sometimes it takes time for Sedgwick to approve absences which qualify as FMLA leave. If discipline is issued for attendance which later is approved as FMLA leave, Respondent will correct the discipline issued to the employee (Tr. 174, 422, 426). Thorne testified that Respondent waits for a "reasonable" period (1 to 2 weeks) before issuing discipline to an employee for attendance to permit the employee to contact Sedgwick for FMLA approval (Tr. 426–428).

Respondent's Environmental Services Department (EVS) consists of the housekeeping and linen staff. The EVS office is in the basement of the facility. Prior to April 2018, Sodexo, a third-party company, managed Respondent's EVS staff. However, in April 2018, Respondent decided to manage the EVS staff internally and hired Glenn McKinnon (McKinnon) as director of housekeeping/EVS on April 20, 2018 (Tr. 36, 293). McKinnon reports to Sprague. McKinnon oversees housekeeping, environmental services, linen, and hazmat for Respondent, and supervises the managers (Tr. 1272). Respondent also hired four managers, Darryl Millet (Millet),[12] Michael Blake (Blake),[13] Silbiano Rubio (Rubio),[14] and Robert Cox (Cox) (Tr. 1791). These managers report to McKinnon. Sodexo management and McKinnon, Blake, Millet, Cox, and Rubio overlapped for an approximately 2-week transition period (Tr. 1928). Thorne and McKinnon denied receiving any documentary information from Sodexo to give to the new management team (Tr. 1929).

Approximately 70 employees work for the EVS department. These employee positions include housekeeping attendant II,[15] lead attendant II, utility attendant,[16] and linen attendant (Tr. 350, 1106). EVS employees may be full time or per diem where these employees are called to work as needed (Tr. 226). These employees work on one of three shifts: day (7 a.m. to 3:30

[12] Millet works from 5:30 a.m. to 5:30 p.m., Thursday to Sunday (Tr. 1687).
[13] Blake works from 5:30 a.m. to 5:30 p.m., Monday to Thursday (Tr. 1593).
[14] Rubio resigned in early to mid–2020 and was replaced by Monica Griego (Griego) (Tr. 1853).
[15] Housekeeping attendant II performs the duties of cleaning, terminal cleaning and disinfecting duties and floor care duties anywhere in the facility including cath labs and isolation rooms (Tr. 522, 875, 1143; GC Exh. 4, Article 19.02).
[16] Utility attendants perform all the same functions as housekeeping attendant II, but they can also climb on ladders to perform overhead work (Tr. 1811; GC Exh. 4, Art. 19.02).

p.m.),[17] swing (3 p.m. to 11:30 p.m.)[18] and graveyard (11 p.m. to 7:30 a.m.). The employees work 40 hours per week and relief employees cleans the employees' assigned areas on the other 2 days of the week (Tr. 1534). Several witnesses testified that only some housekeeping attendants handled floor care which includes buffing, stripping, and waxing (Tr. 914, 994, 1086). A lead attendant may give work assignments to employees (Tr. 1087, 1144, 1321–1322).

Employees' cleaning supplies and tools are maintained in carts which they push to their designated work areas. Employees are also issued two-way radios and/or cell phones during their work shift to communicate with the lead attendant and managers on duty (Tr. 1204, 1381). Generally, two lead attendants work on the day shift while one lead attendant works during the swing and graveyard shifts (Tr. 1207–1209). McKinnon testified that day shift employees generally conduct daily cleaning but will also clean discharged patient rooms if needed. The swing shift employees primarily clean discharged rooms but when there are no discharged rooms to clean, the employees will be assigned detailed work and follow up on work missed during the day shift (Tr. 1532–1533).

Respondent holds meetings which are known as "huddles" outside the EVS office at the start of every work shift. The huddles last from a few minutes up to 15 minutes (Tr. 46–47, 114). During the huddles, managers inform employees about the facility's occupancy that shift, discuss safety issues, and distribute assignment or duty sheets which are to be completed and turned in by employees at the end of the work shift (Tr. 644, 296–297, 1089, 1145, 1203, 1430; GC Exh. 69). The assignment sheet also includes the employee's break times. The employees complete the assignment sheets by noting the rooms or areas cleaned, and the start and stop times (Tr. 1430). In addition, when an employee completes cleaning a room where a patient has been discharged, the employee must communicate the information via phone or radio to the EVS manager on duty as well as the department manager (Tr. 1431). McKinnon testified that if an employee notices when cleaning an area that there are pre-existing deficiencies such as build-up of dirt that employee should report to the managers via radio or phone that cleaning of the area will take a longer amount of time (Tr. 1439–1440). At the end of a huddle, employees may restock their carts with supplies.

EVS managers train and supervise housekeeping employees who ensure that the facility is clean and sanitized for patient safety. This training includes competencies for employees' specific duties as well as yearly training (Tr. 798–799; GC Exh. 11). EVS managers make the employee work schedule, inspect employee work, order supplies which are locked and stored in bulk storage on the back dock as well in the basement linen room, and provide supplies to employees during their shift. EVS managers inspect employees' work throughout the shift by rounding or reviewing certain units or sections of the facility (Tr. 311, 358, 1333, 1430, 1434–1435). The EVS managers know whether a room or area has been cleaned by reviewing the employees' assignment sheets or daily log which they must fill out throughout their shift (Tr. 1333–1334, 1430–1431). The EVS managers will also inspect the employee's assignment sheet

[17] Certain employees assigned to area 1 which is the first floor of the facility including administration offices, restrooms, main lobby, lab, telemetry, and human resources begin working at 6 a.m. (Tr. 1534–1535, 1571, 1688). Approximately 15 to 20 employees work on the day shift.

[18] Housekeeping attendant II Joann Judge (Judge) testified that the swing shift had been created to assist the day shift employees with finishing their tasks (Tr. 1202). Some swing shift employees work slightly earlier than 3 p.m. due to the need to clean discharge rooms (Tr. 1535).

to review which rooms have been completed and ensuring that employees will finish their assigned tasks before the end of the shift (Tr. 1432–1433). Blake testified that EVS managers "strive" to inspect six to nine or more rooms or areas per day (Tr. 311, 1642).

All EVS managers write and issue corrective and disciplinary actions to employees (Tr. 283–284). Any proposed final warnings and terminations and supporting documentation are sent to human resources for approval (Tr. 316). Along with the human resources record keeping, the EVS department also maintains electronic disciplinary folders for its employees (Tr. 1992–1993, 2021–2022). The content of these actions could be from several managers but would be issued by only one manager (Tr. 286). While investigating performance issues, Millet, Blake, Cox, and McKinnon may prepare contemporaneous statements and take photos with either a work or personal cell phone to document the deficiencies but not all disciplinary actions are supported with photographs (Tr. 1342–1343, 1870–1871).[19] McKinnon testified that after he takes the photos, he transfers the photos to his work computer via email, either personal or work depending on the phone used, and then deletes the original photo from his cell phone due to data storage limits (Tr. 2014–2016). Blake testified similarly that he takes photos of performance deficiencies on his personal cell phone, emails the photos to his work email, adds the photos to the employees' EVS department disciplinary file, and then deletes the photos from his work computer (Tr. 2043, 2045, 2049-2050). Cox testified that after compiling any evidence, managers prepare a PowerPoint slide with statements and pictures to support the disciplinary action (Tr. 379). Cox testified that he uses his work phone to take these photos (Tr. 379).

As for records retention, Cox testified that the pictures and documents to support disciplinary actions are kept for 1 year (Tr. 380). McKinnon testified that he was not aware of any policy of Respondent regarding deletion of emails and photos except that he has memory and data limits for his emails (Tr. 2017). He later testified that he was unaware of Respondent's document retention policy and did not check any phones for the original photos when responding to the General Counsel's subpoena requests (Tr. 2017–2019, 2022–2026). Blake also testified that he did not search for emails on his cell phone (Tr. 2047, 2049–2050).[20]

Respondent's dietary department consists of the dietary and cooking staff for Respondent. The dietary department office is located adjacent to the kitchen on the first floor of the facility by the cafeteria. A shared office for the dietary clerks is located next to the dietary

[19] Blake testified that he writes a contemporaneous statement "ninety–nine percent" of the time when an employee will be disciplined due to poor performance (Tr. 1665).

[20] Respondent did not produce the original electronic versions of the photographs taken by Respondent to support the employees' disciplinary actions despite the subpoena requesting this information. The General Counsel requests that I take "an adverse inference that some, if not most of the photographs were not in fact taken on the dates, times and locations they were alleged to have been taken, and may not even be related to any deficiencies in the alleged discriminatee's work" (GC Br. at 125–126). During the trial, McKinnon, Blake, and Cox provided varying testimony as to how long documents need to be retained. I credit their testimony that they did not know Respondent's retention period and created their own method for documenting performance issues. I decline to take an adverse inference as McKinnon, Blake, and Cox provided a satisfactory explanation for why they no longer possessed the original photos. See *Champ Corp.*, 291 NLRB 803 (1988). Respondents provided the entire disciplinary package to the General Counsel which is how these disciplinary actions were presented to the employees and stored. Even if I were to take an adverse inference that the photos were not taken on the dates, times, and locations they were alleged to have taken, an evaluation of the disciplinary documents describes with particularity the deficiencies observed. The photos were additional evidence to support the actions, but not necessary when evaluating the entire disciplinary actions.

department office. Shawn Gregg (Gregg) served as the director of food and nutrition services from 2018 to February 2020 (Tr. 323, 1752, 1851–1852).[21] Paul Cardoza (Cardoza) served as the food production manager/dietary operations manager from January 2016 to January or February 2020 (Tr. 403, 1825, 1827). Hans Weding (Weding) served as the clinical or patient food service manager from March 2018 to February 2020 (Tr. 228, 321, 1750–1751, 1852).[22] Weding reported to Gregg.

The production manager/dietary operations manager directly supervises the cooks, pantry clerks, dishwashers, and porters, and creates schedules,[23] orders products, creates menus and disciplines employees (Tr. 404). The clinical or patient food service manager is responsible for patient care by feeding patients and ensuring that patients' menus were correct (Tr. 321, 1752). The patient food service manager also supervises dietary clerks, cooks, tray line workers and dishwashers. Both the production manager/dietary operations manager and patient food service manager can discipline employees and assign overtime (Tr. 323, 328, 404).[24] The disciplinary process of the dietary department employees matched the disciplinary process of the EVS department.

Approximately 20 to 30 employees work in the dietary department (Tr. 704). These employees include the baker, cafeteria dish-up, cafeteria lead person, cashier, cook's helper, cook trainee, cook, cook II, dietetic clerk, dishwasher/dish machine operator, F.S. tray worker, floor-stock/kitchen runner, griddle cook, kitchen porter, lead porter, and pantry worker. Of relevance, dietary clerks do not generally deliver food to patients' rooms, which is delivered by nurses and certified nurse assistants (Tr. 327–328).

Respondent admits that the following individuals are supervisors and/or agents as defined by Section 2(11) and 2(13) of the Act: Wise, Silver, Schmid, Cassard, Thorne, Irwin, McKinnon, Millet, Blake, Cox, Rubio, Gregg, Cardoza, and Weding.[25]

### *B. The Union*

At all material times since at least January 1, 2013, the Union has been the exclusive collective-bargaining representative of the unit of employees described in article I, exhibit 1 of the expired CBA. These employees include baker, cafeteria dish-up, cafeteria lead person, cashier, cook's helper, cook trainee, cook, cook II, dietetic clerk, dishwasher/dish machine operator, F.S. tray worker, floor-stock/kitchen runner, griddle cook, housekeeping attendant II, kitchen porter, lead attendant II, lead porter, linen attendant, pantry worker, and utility attendant.

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[21] Doreen Chapfield (Chapfield) served as the director of food and nutrition services prior to Gregg but the exact period is not in the record (Tr. 707).

[22] In February 2020, Respondent transitioned the management team from Sodexo to employing the dietary management team directly. Thereafter, in February 2020 Gregg, Cardoza, and Weding transferred to other locations owned by Respondent and/or UHS (Tr. 1852).

[23] Employees' schedules would be posted 2 weeks at a time in a glass encased bulletin board next to the dietary office.

[24] Employees could sign up on a list if they were interested in overtime once available. Cardoza testified that generally the need for overtime arose daily so there would be no posting for the opportunity (Tr. 406). Selection for overtime depended on an employee's qualification for the type of work as well as seniority based on the expired CBA (Tr. 404–406).

[25] Wise, Silver, Schmid, Cassard, and Gregg did not testify.

This recognition was embodied in successive collective-bargaining agreements, the most recent of which was in effect from January 1, 2013, to December 31, 2016 (expired CBA) (GC Exh. 3).[26] The parties have been bargaining for a new CBA for several years but as of the date of the hearing, the parties had not reached an agreement. During bargaining sessions in 2018 and 2019, Schmid, Cassard, Thorne, Gregg, and McKinnon represented Respondent on its bargaining team (Tr. 42, 144–145). During bargaining sessions in 2018 and 2019, Sarah Varela (Varela), outside legal counsel, eventually served as lead negotiator for the Union (Tr. 440–441).[27] Employees Betty Williams (Williams), Patricia Porchia (Porchia), Sedasia Griffin (Griffin), Joann Judge (Judge), Andre Wiggins (Wiggins), Brandi McMorris (McMorris), Alberto Ayala (Ayala), and Smith also attended bargaining sessions (Tr. 43, 446–448, 996–997).

Shop stewards serve as employees' witness during meetings, attend first-step grievance meetings, and attempt to resolve employee disputes with management and human resources (Tr. 621). Article 5 of the expired CBA covers shop stewards whom the Union selects, and states that the Union provides a list yearly to Respondent with the names of the shop stewards. However, the record is devoid of any evidence that the Union provided Respondent with the yearly list. Smith testified that between April 2018 until February 2019, she was the only shop steward as she was the only employee who attended the required training session (Tr. 621–622, 647). Smith explained that Cynthia Walker (Walker) was also a shop steward for some unspecified time but that the Union did not recognize her as the shop steward because she did not attend the training (Tr. 647). Witness testimony confirms that Smith served as shop steward in 2018 and 2019, as she had for the prior 20 years (Tr. 621). But the record is unclear as to whether EVS and dietary management knew that Walker was not an official shop steward. McKinnon testified that Irwin informed him that Smith and Walker were shop stewards (Tr. 1497, 1568). Irwin did not contradict McKinnon's testimony. Smith also testified that employees could ask for a specific employee to represent them in a meeting with management (Tr. 686–687). Hence, Porchia and Judge served as witnesses for employees.

The Union also employs representatives to assist bargaining unit employees. Miguel Canales (Canales) is the current representative, and prior to Canales, Martha Pike (Pike) served as representative (Tr. 464, 1274, 1832–1833). Meanwhile, Kenny Adamson (Adamson) serves as the union organizer (Tr. 1240).

### *C. Complaints against McKinnon*

A couple months after McKinnon began working at Respondent, in approximately May 2018 two employees, Emma Valles (Valles) and Itzel Badillo (Badillo) filed a sexual harassment claim against him.[28] A complaint was also filed by an unnamed individual on the UHS compliance hotline (Tr. 191). Irwin testified that employees complained about McKinnon's management style as well as McKinnon ordering employees to work in areas different from their bid assignments (Tr. 247). The UHS complainant alleged that since May

[26] Although the CBA has expired, Respondent continues to process some grievances including step 1 but has not agreed to arbitration on any matter (Tr. 415, 1840–1841).
[27] Varela also provides the Union general legal advice including on grievances, arbitrations, and negotiations.
[28] Both employees resigned from Respondent in December 2018 (Tr. 593).

2018, McKinnon screamed, yelled, and treated employees poorly, and he would bring female employees out to lunch, get their nails done and bring them to a salon.

Thorne primarily investigated these allegations (Tr. 190–191). Thorne, Cassard, and Sprague interviewed McKinnon (Tr. 52).[29] In response to the allegations against him, McKinnon admitted that during the investigation he told human resources that if a person conspired to get another person fired or maliciously lied to get another person fired, that person should be held accountable (Tr. 58). They also interviewed Blake, two randomly chosen employees, due to the UHS complaint by an unnamed individual, and other employees including Robert Brame (Brame) who worked at Respondent for only 2 weeks as an EVS manager (GC Exh. 26; Tr. 194).[30]

As part of the investigation, Irwin interviewed housekeeping attendant II Oilda Vazquez (Vazquez) (Tr. 194). Vazquez testified that she had an uncomfortable conversation with McKinnon in early June 2018 when she asked for time off. Based on this conversation, Vazquez spoke to Valles about her experience with McKinnon (Tr. 525–526, 535). Thereafter, Vazquez spoke to Thorne (Tr. 533–534). During this conversation, Thorne told Vazquez that Irwin would call her later for a statement (Tr. 536). Irwin spoke with Vazquez and documented the conversation, but at the hearing Vazquez disagreed with some of Irwin's comments in the statement (GC Exh. 27; Tr. 537). Eventually, Thorne informed Vazquez that McKinnon was under investigation, to come to her with further concerns, and to not be alone with him (Tr. 538).

While Thorne investigated the allegations made against McKinnon, Respondent relocated McKinnon's office to the 5th floor of the facility (Tr. 41, 59–60, 919). Ultimately, on June 29, 2018, Respondent concluded that there was insufficient evidence that McKinnon sexually harassed employees. However, Respondent required McKinnon to sign a document agreeing to abide by certain rules set forth in the document (GC Exh. 6; Tr. 60–61).

After a few months, employees again complained about McKinnon's management style. Thus, in November 2018, current housekeeping attendant Chris Flood (Flood) organized a group of employees to go to Irwin's office to complain that McKinnon told the employees that the break room would be cleaned by the employees, one employee assigned per day (Tr. 883, 1154). Judge testified that she, Flood, Cynthia Lyles (Lyles), Sandra Villalobos (Villalobos), Manuel (last name unknown), Rudy (last name unknown), Wanda Wong (Wong), and Sylvia Franco (Franco) attended (Tr. 1154, 1199).[31] Prior to McKinnon's announcement, the employees were

[29] McKinnon could not recall many details of the questions asked of him during the sexual harassment investigation including whether he was asked about yelling at employees, taking employees for manicures and pedicures, taking employees Valles and Badillo to lunch, and making lewd statements to employees (Tr. 55–56).

[30] Thorne wrote in her notes that Brame commented that "[McKinnon] knows that to get rid of unions, you have to have good managers. He's worked with and without unions, and the employees need to trust you and respect you to get rid of them. The employees are keeping the union here because they are afraid" (GC Exh. 27). Thorne testified that she does not know why Brame made this comment (Tr. 430–433). Brame did not testify, and his statement is hearsay on which I do not rely.

[31] Both Judge and Flood testified about this meeting. Although both Flood and Judge are current employees of Respondent who are testifying against their economic interests which gives them both heightened credibility, I find that Judge is more credible that Flood due to Judge's recollection of details and facts. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *Bloomington–Normal Seating Co.*, 339 NLRB 191, 193 (2003). See also *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996). Judge appeared self–assured of the facts to which she was testifying while Flood could not recall as many details. Such lack of

not responsible for cleaning the break room (Tr. 883). During this meeting with Irwin, Flood complained that McKinnon should not talk to them rudely as he had been doing (Tr. 883–884). Judge testified that the employees were upset with McKinnon's belittling of the employees (Tr. 1154–1155, 1199). Irwin told the employees that she would talk to Thorne (Tr. 1155). Eventually, in late December 2018, Irwin told Flood and Judge that McKinnon and the other managers were not from a hospital setting and would likely need classes on how to speak to employees (Tr. 1155). Irwin told the employees that her door would always be open and that they come to her in the future (Tr. 1155).

On approximately December 17, 2018, Vazquez and Smith decided to complain to Irwin that McKinnon was rude and disrespectful to them. Irwin told them she would investigate the issue but she never followed-up with Vazquez and Smith (Tr. 558, 641–643, 1229; GC Exh. 50). Smith testified that Vazquez and she filed individual complaints with the UHS corporate compliance hotline (Tr. 641–642). Smith complained that McKinnon was degrading and hostile to the employees. Smith identified herself in the complaint (Tr. 642).[32]

Then, sometime between the last week of December 2018 and mid-January 2019, Smith went to the NLRB office with Norma Oligone (Oligone), Tanisha Ruiz (Ruiz), and Vazquez (Tr. 648, 949–950). Smith testified that they went to the NLRB office because they wanted to know if their complaints about McKinnon were justified (Tr. 648).

On January 2, 2019, Vazquez filed another online complaint, anonymously, regarding McKinnon and allegations of hostile work environment (GC Exh. 51; Tr. 562–563). Vazquez noted that McKinnon screamed at all the employees (Tr. 593–594). Furthermore, on January 3, 2019, Vazquez filed a complaint with the Nevada Equal Rights Commission alleging retaliation, sexual harassment, and sex discrimination by McKinnon (GC Exh. 52, 54). Vazquez alleged that after the sexual harassment investigation of McKinnon, he increased her work duties. On behalf of Vazquez, three employees submitted statements including Smith on January 7, 2019, Judge on February 26, 2019, and Ruiz on January 18, 2019 (GC Exh. 53; Tr. 568, 920–921).

### *D. 8(a)(1) Allegations*

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act. The rights Section 7 guarantees include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

1. Complaint pars. 5(a)-5(e): On November 12, 2018, Respondent Violated Section 8(a)(1) when McKinnon threatened Smith with Discharge and Silenced Smith During

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recollection does not make Flood's testimony unreliable but when Judge and she are testifying about the same event, I will rely upon Judge's testimony rather than Flood's testimony. For example, Judge did not testify that Olivia (last name unknown), Eric (last name unknown), Tanisha Ruiz (Ruiz), and Sherill Smith (Smith) attended the meeting. I will rely upon Judge's testimony as to who attended (Tr. 882, 1199).

[32] The record is unclear as to whether Vazquez filed her complaint the same day as Smith. The record shows, however, that Vazquez filed a complaint with the UHS corporate compliance hotline on January 2, 2019 (GC Exh. 51).

an Investigatory Interview, Which Conveyed Futility to Employees to Select the Union as Their Bargaining Representative and Required a Union Representative to Remain Silent Which Affectively Denied an Andrew Pietanza a Representative During an Investigatory Meeting.

On November 12, 2018, housekeeping attendant Andrew Pietanza (Pietanza) asked Sherrill Smith (Smith) to accompany him to a meeting with McKinnon and Blake to discuss a step 1 grievance (Tr. 50–51, 635–636, 787, 798; GC Exh. 5). Pietanza complained to McKinnon that he felt that he was being harassed because one of the nurses in the area he cleans "kept eyeballing" him and was "always badgering [him] to get a room done" (Tr. 787). Pietanza testified that in response, McKinnon told Pietanza that possibly Pietanza was "unstable," and it was "not safe" for him in his assigned area (Tr. 787). Smith recalled that McKinnon told Pietanza that they may need to have him evaluated as it may not be safe for him to work where he was assigned (Tr. 636). Pietanza then turned and asked Smith if he heard McKinnon correctly. Smith responded to Pietanza, "I heard that Glenn thinks you might not be stable" (Tr. 636, 787). Both Smith and Pietanza testified that McKinnon became upset due to Smith's comment. Smith and Pietanza testified that McKinnon stood up, leaned over his desk, started screaming and shaking his finger at Smith (Tr. 788). Both Pietanza and Smith testified that McKinnon said to Smith not to put words in his mouth and told her "to sit down and shut up" (Tr. 636, 788). McKinnon told Smith he could terminate her right away if he wanted (Tr. 636, 788). Smith thereafter kept quiet and told Pietanza that she would not speak during the meeting (Tr. 636–637). McKinnon did not testify about what he said to Smith after he believed she misrepresented his statement to Pietanza.

After the meeting, McKinnon sent an email to Irwin and Thorne stating that, as he had explained the prior week, Smith did not act appropriately as a shop steward (Tr. 1316–1317). In his email, he stated that the prior week, in another step 1 grievance meeting filed on behalf of another employee, Smith complained about her own work situation rather than focusing on the grievant. Then that morning, during Pietanza's step 1 grievance meeting, Smith "misrepresented" McKinnon's statements to Pietanza (Tr. 1499–1500). McKinnon complained that Smith appeared to fall asleep during the grievance meeting, and then when she woke up, began again discussing her own work situation. McKinnon closed his email by writing, "Our team needs to be instructed correctly and feel the attending shop steward is awake and focused. I feel confident at this time to say that she is no longer an effective Steward that is participating on the full behalf of witnessing for our team" (GC Exh. 5; Tr. 51, 1499). McKinnon's email does not explain what he did or said after Smith's response to Pietanza. Thorne forwarded the email to Cassard, asking to discuss with the Union "in a side conversation" the issue of Smith's "acting up in step 1 meetings" with the Union (GC Exh. 5).

*Credibility*

I credit Smith and Pietanza's testimony that McKinnon threatened Smith with discharge if she continued to speak and told Smith to "shut up." McKinnon did not testify about what he said to Smith after he felt that she misrepresented his statement. McKinnon's email to Irwin and Thorne also does not include what he said to Smith. McKinnon testified that union representatives during meetings may not ask questions or investigate the matter during the meeting (Tr. 1313–1314, 1498–1499). McKinnon continued that the union representative is

present to listen to the conversation but may ask to speak to the employee privately (Tr. 1314, 1550). Furthermore, Blake was not asked any questions about this event where he was in attendance. But Blake testified that union stewards may only listen and observe during disciplinary meetings (Tr. 315–316). Thus, I credit Smith and Pietanza's testimonies.

*Legal Analysis*

The General Counsel alleges at complaint paragraph 5(a) though 5(e) that Respondent violated Section 8(a)(1) of the Act when on about November 18, 2018, McKinnon threatened employees with discipline and/or discharge unless they remained quiet during the investigatory interview, by silencing the bargaining representative during an investigatory interview, informed its employees that it would be futile for them to select the Union as their bargaining representative, and effectively denied the employee's request for a union representative during the meeting when the representative was silenced.[33] CGC argues that the meeting was an investigatory interview, and that Smith was threatened and precluded from speaking during the meeting (GC Br. at 132–133). Respondent argues that Pietanza was represented during the meeting (R. Br. at 26).

Under *NLRB v. J. Weingarten*, 420 U.S. 251, 253 (1975), an employer violates Section 8(a)(1) of the Act when it denies an employee's request to have a union representative present at an investigatory interview that the employee reasonably believes might result in disciplinary action. The test for reasonableness is measured by an objective standard under all the circumstances in the case, rather than the employee's subjective belief. See *Southwestern Bell Telephone Co.*, 338 NLRB 552 (2002). Furthermore, that representative is entitled to "provide advice and active assistance" and may not be required to "sit silently like a mere observer." *Barnard College*, 340 NLRB 934, 935 (2003).

Here, although the meeting was not an investigatory meeting, but rather a step-1 grievance meeting, Pietanza reasonably believed that he could face discipline and requested Smith attend the meeting as his representative. See *PAE Aviation & Technical Services LLC*, 366 NLRB No. 95 (2018) (citing *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979) ("the full panoply of protections accorded the employee under *Weingarten* may be applicable"). Thereafter, when Smith conveyed to Pietanza what she interpreted McKinnon to say, McKinnon immediately stopped her from speaking and threatened her with termination. Smith would not speak again during this meeting. McKinnon's forceful statement to Smith effectively silenced her participation in the meeting and sent a message to Pietanza that a union representative would be futile. See *Lockheed Martin Astronautics*, 330 NLRB 422, 429 (2000) (Board found improper limit to union representative's participation in an interview when the employer told the representative to "shut up"). Thus, I find that Respondent violated Section 8(a)(1) of the Act when threatening Smith with termination during the meeting and silencing her during this meeting which essentially denied Pietanza's request for a union representative.

2. Complaint par. 5(f): Respondent Violated Section 8(a)(1) in November 2018 when McKinnon Announces That Employees May Not Speak to a Union Steward During Respondent's Time, His Time.

[33] The events seemed to occur on November 12, 2018.

Joanne Judge (Judge) testified that McKinnon told the employees during their huddle meeting in November 2018 that the employees could no longer speak to the shop steward on "Valley Hospital time, on his time," and he did not clarify if the employees could talk to the shop steward on breaks (Tr. 1156–1157, 1199). McKinnon testified that he told employees that they can speak to the shop steward if the steward is not interfering with the employee's "active work" (Tr. 1318). McKinnon clarified during his testimony that employees may speak to the shop steward before their shift, on the lunch break, after their shift or during an investigatory or disciplinary meeting (Tr. 1318).

*Credibility*

I credit Judge's testimony that McKinnon told employees that they could not speak to the shop steward while on his time or Respondent's time. Judge is a current employee who is testifying against her personal, economic interests which enhances her credibility. See *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); and *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). Judge testified in a credible, forthright manner, and could recall details from various events. Judge provided the most consistent testimony of General Counsel's witnesses while recalling various details from the events at issue herein. McKinnon, in contrast, appeared to try to clarify what he told the employees or what he intended to tell the employees. Such post hoc explanation undermines McKinnon's credibility in this instance.

*Legal Analysis*

At complaint paragraph 5(f), the General Counsel alleges Respondent violated Section 8(a)(1) of the Act when in November 2018, McKinnon orally promulgated and has since maintained an overly broad rule that employees may not speak with the Union steward on Respondent's time. CGC argues that McKinnon's statement was overbroad and prohibited employees from speaking to the union steward during breaks (GC Br. at 135–136). Counsel for Respondent did not address this allegation Respondent's brief.

The Board has distinguished "working time" from "working hours" which includes breaks and other nonwork time when determining when an employer may prohibit solicitation. *Our Way, Inc.*, 268 NLRB 394 (1983). An employer may prohibit solicitation during work time but not work hours. In this instance, McKinnon's broad prohibition from employees speaking to the shop steward during Valley Hospital time or his time is sufficiently overbroad to encompass employees' breaks and other non-work times which is unlawful. Thus, Respondent violated Section 8(a)(1) of the Act when McKinnon promulgated an overly broad rule.

3. Complaint pars. 5(g) and 5(h): Respondent Did Not Violate Section 8(a)(1) in November or December 2018 when Weding Allegedly Interrogated and Gave an Impression of Surveillance of Employees' Concerted Activities.

Tami Sambrano (Sambrano) testified that in November or December 2018, Weding asked Marlene Hall (Hall) and her if anyone had been telling employees to complain about scheduling (Tr. 711). Sambrano testified that Weding asked specific questions about employees filing

grievances. She then testified that Cardoza and Weding previously made comments that they are "union workers" and make a lot of money and should not be complaining. Weding testified that he could not recall if Sambrano made any complaints about overtime but admitted that he made mistakes regarding employee pay and overtime (Tr. 331–332).

*Credibility*

I do not credit Sambrano's testimony as this area of questioning and her response was directly based upon a leading question. As I will discuss further in this decision, I do not credit most of Sambrano's testimony. Sambrano testified in a manner that appeared to be not completely truthful and entirely self-serving. Moreover, Sambrano's testimony is uncorroborated since Hall did not testify. Weding provided consistent testimony with his contemporaneous notes. Weding admitted to making errors on employee pay and overtime but denied any further discussion with Sambrano. Weding's testimony appeared truthful due to his admission of some facts which do not favor him such as making errors on employee pay and overtime.

*Legal Analysis*

At complaint paragraphs 5(g), the General Counsel alleges Respondent violated Section 8(a)(1) of the Act when in November or December 2018, Weding interrogated employees about their protected concerted activities and those activities of other employees and created an impression of surveillance by asking these questions. CGC argues that Weding violated the Act when he interrogated and surveilled Sambrano and Hall about employees' protected concerted activities (GC Br. at 136–139). Complaint paragraph 5(h) mirrors complaint paragraph 5(g). CGC presented no evidence as to this allegation and did not address the allegation in its posthearing brief. Counsel for Respondent did not address either allegation in its posthearing brief.

Since I do not find Sambrano credible, complaint paragraph 5(g) is dismissed. Complaint paragraph 5(h) is also dismissed due to lack of evidence.

4. Complaint pars. 5(i) through 5(k): Respondent Violated Section 8(a)(1) on about December 17, 2018 When Denying Vazquez' Request for a Union Representative at a Meeting, Which She Reasonably Believed Would Result in Discipline.[34]

On approximately December 17, 2018, Vazquez asked Smith to represent her during a meeting with management in the EVS office (Tr. 550–551, 637). Vazquez testified that she learned that she would be stripping and waxing the floors during her shift, which was a new task for her, not performed by the employee who occupied her position previously, and generally performed by two graveyard shift utility employees (Tr. 543–544). Vazquez testified that in September 2018 she bid for the attendant II position on the graveyard shift but never received a position description for the position (GC Exh. 49; Tr. 544–545). However, Respondent allegedly provided her with general expectations of the position on December 17, 2018 (GC Exh. 8). Vazquez also testified that she did not receive a daily assignment sheet as she had received in her prior position (Tr. 1219). She told Rubio, who confirmed her new duties, that she wanted to talk

[34] The complaint alleges that this incident occurred on December 13, 2018, but based on the documentary evidence, it appears that the incident occurred on December 17, 2018.

with McKinnon because she did not agree with the decision and did not believe that other employees were asked to perform these same duties (Tr. 547–548, 550, 554). The stripping and waxing process can take hours (Tr. 547). Vazquez testified that she was asked to strip and wax over 50 rooms, hallways, bathrooms, and the dining room in the emergency department in addition to her other duties of scrubbing, sweeping, and mopping (Tr. 553–554).

When Vazquez and Smith arrived for the meeting, McKinnon refused to allow Smith to stay for the meeting because he explained that he was only giving Vazquez a direct order. The meeting occurred with only McKinnon, Rubio, and Vazquez present. During this meeting, McKinnon told Vazquez that her position description called for her to strip and wax the floors. Vazquez argued with McKinnon regarding her job duties and that the stripping and waxing would be "a lot of work." McKinnon told Vazquez that if she "kept on talking he will take it as insubordination and that the floors needed to be done ASAP" as the floors were "horrid" (Tr. 553). Meanwhile, Smith waited in the hallway (Tr. 637). McKinnon then stepped out of his office, asking Smith what she was doing. After Smith explained she was waiting for Vazquez, McKinnon responded that she had come down early from her shift which ends at 7:30 a.m. the day before as she was not allowed in the basement before 7:15 a.m. (Tr. 640).[35]

Later, on January 7, 2019, Smith wrote a statement indicating that Vazquez had been assigned more work than is possible to complete and that Vazquez had to attend a meeting with McKinnon without a witness while Smith waited in the hallway (GC Exh. 53).

In contrast to Vazquez and Smith's testimony, McKinnon testified that Vazquez chose to strip and wax floors as these duties were discussed with her when she chose to go to the graveyard shift (Tr. 70–71, 73, 75). McKinnon testified that only employees who know how to wax and strip floors and who want to do that type of work are assigned such duties (Tr. 69–70). McKinnon did not testify about this specific meeting with Smith and Vazquez.

*Credibility*

I credit the testimony of Vazquez and Smith that McKinnon refused to permit Smith to attend the meeting. McKinnon did not refute their testimony. Furthermore, Vazquez' written incident report corroborates her testimony that McKinnon assigned her the duties of stripping and waxing the floors, and her concerns about the assignment of these additional duties. Smith's proximate hand-written note also corroborated their testimony that Vazquez had to attend the meeting without representation. I do not credit McKinnon's testimony that Vazquez chose to strip and wax the floors. Such testimony is illogical when Vazquez' purpose in speaking with McKinnon on December 17, 2018, was to discuss her disagreement with being assigned those duties.

[35] As discussed previously, after this meeting, Vazquez and Smith complained to Irwin about McKinnon's treatment of the employees. Vazquez provided a written "incident report" of her meeting with McKinnon (GC Exh. 50). Vazquez wrote that she was "worried that Glenn [McKinnon] was overworking" her or "he's taking retaliation for the complaint" they had with human resources about him.

*Legal Analysis*

At complaint paragraph 5(i) though (k), the General Counsel argues that McKinnon denied Vazquez' request for Smith to represent her during an interview where she feared discipline and that the interview occurred without Vazquez having a union representative. CGC alleges that Vazquez entered the meeting believing that the additional duties she was given was in retaliation for her participation in the sexual harassment investigation in June 2018 (GC Br. at 133). Respondent argues that since Vazquez admitted that McKinnon gave her direct order, this meeting was not investigatory in nature (R. Br. at 26).

Based on these facts, I find that Vazquez reasonably believed that the meeting could lead to discipline, and wrongfully was denied representation during this meeting. Objectively, Vazquez asked to meet with McKinnon to discuss the additional work assigned to her which was different from work she had performed before and which had not been performed by the employee who occupied the position before her. Vazquez explained that she did not believe she could complete the assigned tasks during her work hours. Even a conversation between a supervisor and an employee about improving the employee's production may trigger *Weingarten* rights if sufficiently linked to a real prospect for poor production. *Quazite Corp.*, 315 NLRB 1068 (1994). Moreover, Vazquez was concerned that McKinnon assigned her these additional duties in retaliation for her participation in the sexual harassment investigation of him. Accordingly, McKinnon's refusal to provide Vazquez with a union representative when she requested one violated Section 8(a)(1).

5. Complaint pars. 5(l), (m) and (n): Respondent Violated Section 8(a)(1) When on January 24, 2019, Thorne and Three Security Guards, Agents of Respondent, Interrogated, Threatened, and Engaged in Surveillance of Employees Hand Billing and Orally Promulgated an Overly Broad Rule. However, Respondent Did Not Violate Section 8(a)(1) On February 15, 2019 As Alleged.

Respondent's facility is located on Shadow Lane in Las Vegas, Nevada. The main entrance is on Shadow Drive, and this entrance is used by both visitors and employees. The main entrance leads into the lobby of the facility (Tr. 381–382). On January 24, 2019, after a bargaining session with Respondent, Smith, Porchia, Pietanza, Sambrano, Williams, Griffin, and other employees and Adamson participated in hand billing outside the main entrance of the facility on the sidewalk at Shadow Lane (Tr. 658–659, 681, 717, 1007–1008; GC Exh. 64). Smith testified that McKinnon passed by the employees, joking about having bagels inside the facility. Smith also testified that Thorne told Porchia that she could not be out there and would call the attorney (Tr. 660, 691, 694). Porchia testified that Thorne approached her on the sidewalk and asked her what she was doing. Porchia replied that they were passing out union flyers. Porchia testified that Thorne told her that they were not supposed to leaflet for 10 days (Tr. 1009–1010). Thorne then walked into the front door of the facility. In contrast, Thorne admitted she talked to the employees but denied asking them what they were doing. She testified that she did not recall the employees passing out flyers but recalled that they were holding signs. Thorne testified that she wanted to remind the Union that they must provide 10-day notice of intention to picket in front of the facility (Tr. 146–148).

Approximately 11 to 12 minutes later, three unnamed individuals, wearing security uniforms, with UHS badges, came outside and asked Porchia what they were doing (Tr. 660, 1939).[36] Adamson came over and told them that they were leafletting (Tr. 1012). One individual went inside the facility while the remaining two individuals stayed outside. That individual came back outside and told the employees that they could stay to leaflet but they must stay on the sidewalk (Tr. 1012–1014). All three individuals left. Smith also testified that no one told the employees to discontinue passing out union flyers (Tr. 681).

Another hand billing event occurred on February 15, 2019, when Pietanza, Smith, Porchia, Villalobos, Flood, and Adamson passed out union flyers (Tr. 813–814, 897–898, 1055–1056; GC Exh. 66). Villalobos testified that Adamson told her to go to work because McKinnon was looking at her from inside the facility, but Villalobos did not see McKinnon looking at her (Tr. 1058, 1070).[37] Villalobos testified that she saw lead attendant Marlene Ordonez (Ordonez) outside of the facility with a phone in her hand. Ordonez looked at Villalobos and then walked inside the facility. Villalobos testified that Ordonez then met with McKinnon who was writing something down as he looked outside the facility at those on the sidewalk (Tr. 1059–1060, 1070–1071). Villalobos testified that she met Vazquez inside the cafeteria and Villalobos reported what she had observed to Vazquez (Tr. 1060). Vazquez did not testify about any conversations with Villalobos. McKinnon initially was unsure but then denied being able to view the sidewalk and hand billing from inside the facility (Tr. 88, 1336).

McKinnon testified that as he went to lunch off Respondent's property, he saw at least three hand billing events outside the facility which occurred after CBA negotiations took place that day (Tr. 88, 1335–1336). McKinnon denied observing any hand billing from inside the main lobby of the facility (Tr. 1336). Blake also recalled one occasion when he saw employees passing out flyers around the front entrance and sidewalk of the facility (Tr. 308). Blake testified that McKinnon and he only said hello and good afternoon to the employees (Tr. 308).

[36] Allied Universal has employed Respondent's security staff for the past 7 years (Tr. 1853, 1937). The General Counsel alleges, and Respondent denies, that these individuals are security officers at the facility and have been agents of Respondent within the meaning of Sec. 2(13) of the Act. As set forth in Sec. 2(13), when making an agency determination, "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." If they are not agents, then any unlawful statements cannot be attributed to Respondent. The burden of proving an agency relationship is on the party asserting its existence which in this instance is the General Counsel. "The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. An individual can be a party's agent if the individual has either actual or apparent authority to act on behalf of the party." *Cornell Forge Co.*, 339 NLRB 733, 733 (2003) (citing *Pan–Osten Co.*, 336 NLRB 305, 306 (2001)). "The test is whether, under all circumstances, the employees 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *GM Electrics*, 323 NLRB 125, 125 (1997); *Southern Bag Corp.*, 315 NLRB 725, 725 (1994). The Board has found that security guards may be agents of an employer as defined by Sec. 2(13) of the Act when the guard may stop persons from entering a plant. *Cooking Good Division of Perdue Farms, Inc.*, 323 NLRB 345, 351 (1997) (security guards placed in a position to stop individuals from entering premises are cloaked with apparent authority). The record contains little evidence as to who these individuals were, but a logical inference may be made from their attire and badges that they had apparent authority to decide whether individuals would be permitted to remain on Respondent's property. Thus, I find that the three individuals were agents of Respondent.

[37] Adamson was not asked any questions about either hand billing event at issue in this matter.

*Credibility*

As for the January 24, 2019 hand billing event, Smith, Porchia, and Thorne consistently testified that Thorne approached the employees and spoke to them. But their testimonies diverge as to what was said by Thorne. Thorne admitted to informing the employees that they needed to provide 10-day notice to picket but did not tell the employees to stop their activities or ask them what they were doing. Although Smith could overhear this conversation between Porchia and Thorne, she recalled possibly hearing Thorne telling Porchia she would be calling their attorney. However, Porchia did not testify that Thorne told her she would call an attorney. Thus, I disregard Smith's testimony during this occasion. I rely on Porchia's testimony as to what Thorne said to her. It seems unlikely that Thorne would not see the flyers the employees were handing out. About the three unnamed individuals, I credit Porchia's testimony as her testimony was uncontradicted and seemed plausible given the events of that day.

As for the February 15, 2019 hand billing event, I do not credit Villalobos' testimony. Much of her testimony was based on hearsay conversations with other employees, and assumptions as to her observations, rather than a first-hand account of what occurred. Moreover, Vazquez did not testify about any conversations she had with Villalobos after the hand billing event.[38]

*Legal Analysis*

At complaint paragraph 5(l), the General Counsel alleges on January 24, 2019, Thorne, at the sidewalk outside the facility, observed, approached, interrogated, and threatened employees; engaged in surveillance of their union activities; interrogated employees about their union membership, activities, and sympathies; and orally promulgated and since maintained, an overly broad rule with employees that they were prohibited from hand billing and passing out flyers. At complaint paragraph 5(m), on January 24, 2019, the General Counsel alleges that Respondent by three unidentified hospital security officers, at the sidewalk of the facility observed, approached, interrogated, and threatened employees; engaged in surveillance of employees' union activities; remained behind to observe employees after interrogating them regarding their union and protected concerted activities, thereby creating an impression that their union and protected concerted activities were under surveillance; and interrogated employees about their union membership, activities, and sympathies. At complaint paragraph 5(n), on about February 15, 2019, the General Counsel alleges that McKinnon and Blake, at the sidewalk outside the facility, observed and documented which employees were participating in hand billing; engaged in surveillance of employees' union activities; and created an impression among the employees that their union activities were under surveillance. The General Counsel alleges that these allegations violated Section 8(a)(1) of the Act. Counsel for Respondent did not address these allegations in Respondent's post-hearing brief.

Regarding surveillance, management officials may observe open and public union or protected activity on or near the employer's premises, without violating Section 8(a)(1) of the

[38] Vazquez testified about participating in a hand billing event on or after March 21, 2019. However, she then testified that the hand billing in which she participated occurred in the fall. Vazquez testified that she saw McKinnon and Blake watching them for 10 minutes from inside the hospital (Tr. 579–581). I do not credit Vazquez' testimony as she was inconsistent as to when the hand billing occurred.

Act, if the management officials do not engage in behavior "out of the ordinary" and thereby coercive. *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005); *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. sub nom. *S.J.R.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993). To determine whether an employer's surveillance is unlawful, the Board considers indicia of coerciveness, including the duration of the observation, the employer's distance from its employees while observing them, and whether the employer in engaged in other coercive behavior during its observation. *Aladdin Gaming*, supra at 586.

When evaluating alleged interrogations, the Board examines all the circumstances to determine if the questioning would have reasonably tended to restrain or coerce employees in the exercise of protected concerted activity. See *Rossmore House*, 269 NLRB 1176, 1178 (1984), affd. sub. nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (the Board set forth a test for examining whether an interrogation is unlawful). Factors to considered include the questioner's identity, the nature of the relationship between the questioner and the employee, the place and method of questioning, the nature of the information sought and whether it would reveal previously undisclosed union sympathies or activities, whether the questioner offered any legitimate explanation for the question or assurance against reprisal, the truthfulness of the employee's reply, and whether there is a history of employer hostility to union activity. Id. at 1178 and fn. 20; *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 16–17 (2018), enfd. 779 Fed. Appx. 752, 2019 WL 3229142 (D.C. Cir. July 12, 2019); *Novato Healthcare Center*, 365 NLRB No. 137 (2017), enfd. 916 F.3d 1095, 1106 (D.C. Cir. 2019). The Board also considers whether the interrogated employee is an open and active union supporter. See, e.g., *Southern Bakers, LC*, 364 NLRB No. 64, slip op. at 7 (2016), enfd. in relevant part 871 F.3d 811 (8th Cir. 2017).

An employer may not prohibit employees from distributing union literature in nonworking areas on nonworking time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). Specifically, the Board has held that "[t]he distribution by off-duty employees of union literature in company parking lots is clearly protected by Section 7 of the Act" absent a showing that any work performed there is integral to the business operations. *St. Luke's Hospital*, 300 NLRB 836, 837 (1990); *Meijer, Inc.*, 344 NLRB 916, 917 (2005), enf. in relevant part 463 F.3d 354 (2006); *Tri-County Medical Center*, 222 NLRB 1089 (1976) (rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid); *Southern Bakeries, LLC*, 368 NLRB No. 59, slip op. at 1–2 (2019) (citing *Piedmont Gardens*, 360 NLRB 813 (2014)). In a health care setting, the Board has acknowledged an employer's interest in limiting employee solicitation or distribution based on patient care such that hospitals may be warranted to prohibit solicitation and/or distribution in immediate patient care areas, but the employer carries the burden of proving legitimate business considerations. See *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978) (burden is on hospital to show that the selective ban on solicitation is "necessary to avoid disruption of health-care operations or disturbance of patients").

In this case, even though employees handed out union flyers after the bargaining session for a new CBA, Thorne, who was on Respondent's bargaining team, asked the employees what they were doing, and told Porchia that they could not pass out flyers for 10 days. Although the interaction was brief, Thorne's question as well as statement created an impression that the

employees' union activity and protected concerted conduct was being watched. Thorne also raised a question as to whether the employees' conduct was lawful at the time. Thorne's conduct was out of the ordinary since she could clearly see what the employees were doing, asked them a question anyway as to what they were doing, and questioned the lawfulness of the timing of handing out flyers. Furthermore, Thorne's statement that the Union needed to provide 10-day notice was a threat and an overly broad rule as the record lacks any evidence for the basis for such restrictions. Such conduct is coercive and constituted unlawful interrogation, surveillance, and an overbroad rule of employees' protected union activity in violation of Section 8(a)(1) of the Act.

Moreover, the three unidentified individuals were security officials who are agents of Respondent. After Thorne's coercive conduct, the security officials came outside the facility and asked the same questions. Based on the sequence of events, this questioning constituted unlawful interrogation. After Adamson spoke to one of them, one security official went inside the facility while the other two security officials stayed outside, observing the employees while they passed out union flyers. Eventually the security official told the employees that they could pass out flyers but to remain on the sidewalk. Such conduct, once again, is coercive. The conduct of the security officials appears out of the ordinary and is coercive and created an impression of surveillance. Thus, Respondent violated Section 8(a)(1) of the Act when the security guards, who are agents of Respondent, interrogated and surveilled employees' protected union activities.

However, I do not find that McKinnon or Blake's actions violated the Act on February 15, 2019. The credited evidence does not prove that McKinnon or Blake acted out of the ordinary on that date. They testified that observed the hand billing when returning from lunch off property. They did not speak to the employees beyond pleasantries. In addition, the credited evidence does not support the claim that McKinnon observed the employees from inside the facility. Even if McKinnon could see from inside the lobby to the sidewalk, Villalobos' testimony is speculative and only based on assumption. If McKinnon passed by the employees and sought to write down their names, he would not need Ordonez to tell him who was out on the sidewalk passing flyers. Thus, complaint paragraph 5(n) is dismissed.

6. Complaint pars. 5(o) through 5(q): Respondent Violated Section 8(a)(1) when McKinnon on March 20, 2019 Denied Vazquez the Union Representative of Her Choice, who was Available, during a Meeting, which was Still Held, Which She Reasonably Believed Would Result in Discipline.

On March 20, 2019, Millet issued Vazquez a level 1 preventative counseling for failing to call in her absence at least 4 hours prior to her shift starting on March 18, 2019 (GC Exh. 18). Vazquez disputed the preventative counseling because she had called her manager to request FMLA leave. When Millet called Vazquez into the office to issue her the preventive counseling, McKinnon and Rubio were present along with Walker as her union representative. Vazquez asked for Porchia as her union representative, not Walker. Vazquez testified that McKinnon, Millet and Rubio refused (Tr. 582–583). The meeting proceeded with Walker acting as Vazquez' representative. During this meeting, Vazquez testified that Millet showed her photos from February 2018 where she had not properly cleaned a room, but he did not provide her any disciplinary forms at that time (Tr. 583–584). Vazquez also testified that McKinnon threatened

her with termination due to insubordination if she continued to ask for an explanation regarding the FMLA leave (Tr. 586). After the meeting, Vazquez again went to speak with Irwin on March 20, 2019, and submitted a statement of what occurred during the meeting with McKinnon (GC Exh. 58).

McKinnon testified that if an employee asks for a union representative during a meeting, the questioning and conversation ends until a representative may be obtained (Tr. 1313, 1496–1497). He further testified that employees could select which representative they wanted, and if that representative was not available, the meeting would be delayed (Tr. 1497).

*Credibility*

I credit the testimony of Vazquez that McKinnon refused to allow Vazquez to pick a representative of her choice. Vazquez' contemporaneous message to Irwin and Thorne was consistent with her testimony. McKinnon did not directly refute her testimony but testified that he would allow employees to select who they chose as a representative. However, McKinnon's testimony is contradicted by current employee Flood, who testified that in February 2019, McKinnon called her into his office to be a witness for two employee terminations which occurred the day after Smith had been terminated (Tr. 1168–1169). McKinnon told Judge to only be a witness, and to not speak (Tr. 1169). Flood's credible testimony contradicts McKinnon's broad statement that he always honors employee requests. Thus, I credit Vazquez' testimony.

*Legal Analysis*

At complaint paragraph 5(o) though (q), the General Counsel alleges and argues that McKinnon denied Vazquez' request for a union representative of her choice during a meeting where she was issued a disciplinary action as well as a conversation about a prior performance issue she had, that Vazquez reasonably feared discipline, and McKinnon continued the meeting without permitting Vazquez to have Porchia represent her (GC Br. at 134). Counsel for Respondent argues that the meeting was not investigatory in nature and that Vazquez was provided a representative (R. Br. at 26–27).

Based on these facts, I find that Vazquez reasonably believed that the meeting could lead to discipline, and wrongfully was denied a representative of her choice during this meeting. Notably, McKinnon brought in Walker as Vazquez' union representative thereby sending a message to Vazquez that this meeting could lead to disciplinary action. Thus, Vazquez asked for a different representative but was denied. As this meeting progressed, Vazquez was then also confronted with a performance matter from a month prior. When Vazquez asked questions about the disciplinary action she was issued, McKinnon then threatened her with insubordination. Vazquez reasonably believed that the meeting could result in disciplinary action and was denied the representative of her choice after McKinnon, without Vazquez' request, chose a representative for her. There is no evidence in the record that Porchia was unavailable at the time of this meeting. An employer violates Section 8(a)(1) when the employee's chosen representative is available, by insisting that another union representative more to the employer's liking represent the employee. *PAE Applied Technologies, LLC*, 367 NLRB No. 105 (2019);

*Consolidated Coal, Co.*, 307 NLRB 976 (1992). Accordingly, McKinnon's refusal to provide Vazquez with a union representative of her choice violated Section 8(a)(1).

7. Complaint pars. 5(r) through 5(t): Respondent Did Not Violate Section 8(a)(1) on March 27, 2019 as Alleged.

On March 26, 2019, Blake, Cox, and McKinnon conducted an inspection of Andrew Pietanza's (Pietanza) work area with a patient experience employee who is responsible for ensuring a good facility experience for patients. During this inspection, they found numerous deficiencies (R. Exh. 13). The following day, on March 27, 2019, Blake and Millet commenced a retraining program for Pietanza, which they documented (R. Exh. 15; Tr. 1700). In this "retraining program," Millet and Blake observed Pietanza perform his duties, and then they documented what they observed including several deficiencies. The performance deficiencies observed were like the ones Pietanza had been previously disciplined where Pietanza's cleaning was "all over the place" rather than a systemic process (Tr. 1700, 1702).[39] Furthermore, Respondent rated Pietanza's performance after cleaning a discharge room, using a UHS form. Millet, Blake and Pietanza signed these notes (Tr. 1702). Pietanza did not pass the evaluation but he did not sign the evaluation; Millet wrote in Pietanza's name (R. Exh. 15; Tr. 1702–1703, 1742).

*Credibility*

Pietanza's testimony regarding March 26 and 27, 2019 was difficult to follow. Overall, I could not rely upon Pietanza's testimony due to his inability to stay focused on the questions being asked. Furthermore, Pietanza clearly had his subjective beliefs that he sought to convey rather than testifying as to his recollection of events. His testimony was simply confusing and unreliable. Pietanza claimed that he was presented with a disciplinary document on March 27, 2019, but there was no evidence in the record that he was disciplined on or around that date. Pietanza also alleged he asked for a witness but was told that he did not need a witness since Cox was present. Pietanza could not recall any details as to what happened during this alleged meeting (Tr. 825). I cannot credit Pietanza's testimony as the evidence only supports a training program commenced for him by Millet and Blake.

*Legal Analysis*

At complaint paragraph 5(r) through (t), the General Counsel alleges that Respondent violated Section 8(a)(1) when on March 27, 2019, Blake and Millet denied Pietanza's request for a Union representative of his choice when he had reasonable cause to believe that the interview would result in disciplinary action. CGC argues that Pietanza reasonably feared discipline and asked for a representative but was denied (GC Br at 134–135). Counsel for Respondent argues that Pietanza was merely trained, and there was no investigatory meeting (R. Br. at 26).

Here the credited evidence shows that Blake and Millet retrained Pietanza on March 27, 2019. They did not ask Pietanza any questions but instead observed him as he performed his duties. Thereafter they asked him to sign the document they created based on their own

[39] These disciplinary actions will be discussed further within this decision.

observations. No disciplinary action was provided to him on that day. The Board has held that when an employer holds a meeting with an employee to retrain the employee *Weingarten* rights do not apply. *Success Village Apartments, Inc.*, 347 NLRB 1065, 1071 (2006). The meeting Blake and Millet conducted with Pietanza was limited in purpose and was not conducted to seek information from Pietanza. As stated previously, I do not credit Pietanza's testimony that he requested a union representative, but even if he did, Respondent was not obligated to provide him a union representative. Thus, Respondent did not violate the Act as alleged.

8. Complaint par. 5(u): Respondent Violated Section 8(a)(1) When on May 2, 2019, McKinnon Orally Promulgated an Overly Broad Rule Prohibiting Employees from Complaining About Respondent's Dress Code Policy, That It Would Be Futile to Complain to Human Resources, Threatened Employees with Closer Supervision, and Threatened Employees with Discharge.

Respondent has had a policy concerning employee dress code which has been in effect since October 12, 2009 (R. Exh. 83). Specifically, Respondent's dress code sets forth standards for uniforms and clothing, shoes, hair, fingernails, and jewelry. The dress code policy is maintained on the intranet to which employees have access (Tr. 238–240, 1848–1850; R. Exh. 80 and 83). Thorne testified that employees would become aware of the dress code during their new hire orientation as well as during employment if the employee is violating the dress code policy (Tr. 1849, 1925). Furthermore, any new policy or rule at Respondent would be announced through the learning management system (LSM) which is the employees' training database (Tr. 1850, 1926). Employees may access the LMS database using any computer in the hospital including the EVS employee lounge and dietary department (Tr. 1926). Training occurs throughout the year with deadlines to complete the training varying by topic (Tr. 1927–1928, 1958).

McKinnon testified that when he began working at the facility in March 2018 and into 2019, he noticed that employees were not following Respondent's dress code which created safety and hygiene issues (Tr. 48, 1307–1308, 1544–1545). Initially, McKinnon sought employee cooperation by speaking to the employees about compliance, and training employees on the proper dress code including personal appearances (Tr. 1308–1309, 1492–1493). Cox testified that he told employees that they may not wear piercings, other than ear piercings, while working, and that the additional piercings must be removed, or the employee face discipline (Tr. 373).

On April 24, 2019, Judge and Villalobos testified that during a huddle before their swing shift, Cox discussed Respondent's dress code including its policy on body piercings (Tr. 1061–1062, 1173). At this meeting Cox told the employees that they must remove any piercings from their face, earlobes, wear the official uniform and trim their hair (Tr. 1062). Judge testified that she had her piercings for 9 years while working at the facility and no one questioned her or informed her to remove her piercings before that time (Tr. 1173). Cox told the employees that piercings must be removed by the following day or the employees would be discipline.[40]

[40] Later that evening, Villalobos attended a meeting with Cox with Judge acting as her representative (Tr. 1063). Villalobos asked Cox why the employees had to remove their piercings. She told Cox that when she was hired, she had long nails and hair, and piercings, and that if she had to remove her piercings, employees with tattoos should be required remove their tattoos (Tr. 1063, 1076). Villalobos testified that Cox laughed and said the conversation

The next day, Villalobos, who also had piercings, and Judge went to speak with Irwin about the issue (Tr. 1174). Judge testified that she spoke primarily during this meeting, complaining that if this rule existed then it had never been enforced and that other employees at the facility had piercings as well (Tr. 1174–1175). Irwin told them that she would discuss with Thorne and get back to them (Tr. 1063–1064, 1175). Judge testified that Cox then approached her a few hours later and told her not to worry about the piercings (Tr. 1175).

Thereafter, on May 2, 2019, during a huddle meeting which Judge attended, along with Cox, Rubio, and Millet, McKinnon told the employees that he would be enforcing the dress code policy immediately. McKinnon also told the employees that they could not wear dangling earrings, needed to put up their hair, could not have acrylic nails, and wear no nail polish (Tr. 1176–1177). McKinnon told the employees to write him a note if they had concerns and to not go to human resources because they could not help the employees (Tr. 1177, 1196). At the end of this meeting, McKinnon told the employees that their evaluations were upcoming, and they were all on probation (Tr. 1065, 1177).

McKinnon testified, "[W]e were told to go ahead [by human resources] and make certain that everyone complies with [the dress code] and then we actually pulled back enforcement on that [. . .] unless it was an outright safety" concern (Tr. 1309, 1493, 1495, 1496, 1544–1546, 1548). McKinnon testified that no employees were out of compliance with the piercings portion of the dress code policy (Tr. 1309–1310). McKinnon testified that enforcement of the dress code only occurred after employees were reminded of the policy (Tr. 1546–1548).[41]

*Credibility*

I credit Judge's testimony that McKinnon told the employees not to go to human resources, and they were on probation since their evaluations were upcoming. Judge, who is testifying against her economic interests, is a credible witness who recalled many details of these meetings. See *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); and *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996). In addition, McKinnon was not questioned as to what he told the employees on May 2, 2019. Instead, McKinnon claimed that the employees came quickly into compliance with the piercings portion of the dress code policy, and that he did not have employees who were out of compliance with the dress code policy. Such a claim is clearly not credible since at least two employees complained about the dress code policy. McKinnon's attempt to minimize the employees' negative reaction to the dress code policy enforcement is belied by Judge and Villalobos' attempts to push back on enforcement of the policy.

*Legal Analysis*

At complaint paragraph 5(u), the General Counsel alleges Respondent violated Section 8(a)(1) of the Act when McKinnon, on about May 2, 2019, orally promulgated an overly broad rule prohibiting employees from collectively protesting Respondent's dress code, by telling

would continue another day.

[41] McKinnon testified that except for Judge who brought in a doctor's note regarding piercings, Respondent enforced the dress code policy (Tr. 1065, 1548).

employees that it would be futile to collectively protest to human resources, threatened employees with closer supervision if probation requirements were not met, and threatened employees with discharge if probation requirement were not met because they engaged in protected concerted activities. CGC argues Respondent enforced the dress code policy to target Judge and Villalobos to retaliate against them for their Section 7 activity because they complained to human resources previously and threatened the employees with closer supervision and discipline (GC Br. at 150–151). Counsel for Respondent did not address this allegation in its brief.

An employer violates Section 8(a)(1) of the Act when it maintains a workplace rule or policy which would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1988), enfd. 203 F.3d 52 (D.C. Cir. 1999). In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board established a new standard to determine whether a facially neutral rule or policy violates Section 8(a)(1) of the Act, overruling the "reasonably construe" standard of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). In *Boeing Co.*, the Board stated that when evaluating a facially neutral rule or policy "the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing Co.*, supra, slip op. at 3.[42]

McKinnon's comments to the employees that they bring concerns directly to him and to not go to human resources would reasonably chill employees' exercise of their Section 7 rights. Prior to McKinnon's meeting with the employees, Judge and Villalobos had already complained to human resources about the enforcement of the dress code policy. McKinnon's comments, on the heels of their human resource meeting, would reasonably chill the employees' right to collectively complain to human resources. Thus, his rule is overbroad and unlawful.

Furthermore, McKinnon's comments at this meeting that the employees would be evaluated soon, and all were under probation would be considered a threat for engaging in protected concerted activities. These comments came after he told the employees to not go to human resources about the dress code policy, and that he would address their concerns. The Board has held that threatening employees with reprisals for engaging in union or other protected concerted activities is coercive to the exercise of their Section 7 rights under the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010) (employer violates Sec. 8(a)(1) if it communicates to employees that it will jeopardize their job security, wages, or other working conditions if they support the union); *Baddour, Inc.*, 303 NLRB 275 (1991) (an employers' threats of discipline or job loss for participation in protected concerted activities constitute violations of the Act). The Board has applied this theory to explicit or implicit threats to employees, including the loss of their jobs or other adverse work consequences. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1091–1096 (2004) (employer violated Sec. 8(a)(1) of the Act by threatening loss of benefits, loss of jobs, and closure of the facility if the employees supported the union); *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993) (implied threat contained in employer's posting violated Sec. 8(a)(1) of the Act); *Metro One Loss Prevention Services Group*, supra at 89–90 (employer implied working conditions could

[42] As result of the balancing, the Board established three categories of employment rules, policies and handbook provisions which are not part of the test but are a result of the application of the test.

deteriorate if the employees supported the union organizing drive in violation of Sec. 8(a)(1) of the Act).

Based on the facts presented, I find that Respondent violated Section 8(a)(1) of the Act when McKinnon promulgated an overly broad rule prohibiting employees from engaging in protected activity when protesting the dress code, as such action would be futile, and when he threatened the employees with disciplinary action for engaging in such actions.

E. *8(a)(2) and (1) Allegations*

Complaint par. 6: Respondent Did Not Violate Section 8(a)(2) and (1) When McKinnon Spoke to Three Employees About Forming a Committee

In March 2019, McKinnon asked housekeeping lead attendant Wanda Wong (Wong), Flood, and Judge to step forward during a huddle meeting so he could speak with them (Tr. 899–901, 1171–1172). McKinnon spoke to the three employees alone and told them that he wanted to plan a committee to understand the facility's workflow. He sought their assistance because they had been employed for some time at the facility (Tr. 1172-1173). Judge testified that they agreed to form the committee, but the committee never met (Tr. 899, 906, 1172, 1207).

*Credibility*

McKinnon was not asked any questions about this meeting. Thus, I credit the consistent testimonies of Flood, Wong, and Judge regarding this committee.

*Legal Analysis*

At complaint paragraph 6(a) and (b), the General Counsel alleges that Respondent violated Section 8(a)(2) of the Act when McKinnon met with and directed employees to form and participate in a committee to deal with Respondent concerning working conditions. CGC argues that McKinnon created a labor organization (GC Br. at 151–152). Counsel for Respondent did not address this allegation in Respondent's brief.

"Labor Organization" is defined in Section 2(5) of the Act as:

> . . . [A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

The definition of labor organization is broadly construed and is a question of fact. *NLRB v. Peninsula General Hospital Medical Center*, 36 F.3d 1262, 1269 (4th Cir. 1994); *Electromation Inc.*, 309 NLRB 990, 994 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). The organization is not required to have a formal structure, elected officers, constitution, or bylaws, nor is it required to meet regularly. Id. at 994. Even without this formal framework or regular meetings, the group may meet the definition of Section 2(5). Id.

In examining whether the definition of labor organization applies to a group, the Board applies a four-part test: (1) employee participation; (2) purpose to "deal with" employers; (3) the dealing concerns conditions of employment or other statutory subjects; and (4) for employee representation committees, evidence that the committee has some representation of employees. *Electromation*, 309 NLRB at 996. Here, although the committee McKinnon sought to create never met after the initial discussion, the unrefuted evidence shows that he wanted to create a committee where these three employees would provide him feedback on the workflow in the EVS department. However, I cannot find that the General Counsel has proven that the committee "dealt with" the employer. In this instance, McKinnon spoke to the Flood, Wong, and Judge but they did not provide any feedback or suggestions as to the committee's purpose. "Dealing with" contemplates "a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5), couple with real or apparent consideration of those proposals by management." Id. at 995 fn. 21. The bilateral mechanism ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, and management responds to those proposals by acceptance or rejection by word or deed. *E.I. du Pont & Co.*, 311 NLRB 893, 894 (1993). The committee never met again, and the General Counsel's allegation of McKinnon creating a labor organization cannot be proven as the evidence is insufficient. Thus, this complaint allegation is dismissed.

### *F. 8(a)(3) and (1) Allegations*

In complaint paragraph 7(a) through (h), the General Counsel alleges that Respondent subjected employees to closer supervision, discipline including suspensions and terminations, increased work assignments, and disparately administered its FMLA policy in violation of Section 8(a)(3) and (1) of the Act. In addition, the General Counsel alleges McKinnon restricted Smith's access to the facility during work and non–work hours. I will discuss the allegations per employee rather than in complaint order.

#### *Legal Framework*

Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection. For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee himself. *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The statute requires the activities to be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers I*, supra; *Meyers II*, supra; *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3 (2019) (citations omitted) (profanity laced statement by single employee concerning customer call routed to him was not protected or concerted as employees as a group had no preexisting concerns about customer calls, and no evidence that employee sought to initiate or induce group action). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties*

*Installations, Inc.*, 344 NLRB 191, 196 (2005). The Act protects discussions between two or more employees concerning their terms and conditions of employment. Whether an employee's activity is concerted depends on the way the employee's actions may be linked to those of his coworkers. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Concertedness is analyzed under an objective standard. *Fresh & Easy Neighborhood Market*, supra at 154. Employees act in a concerted manner for a variety of reasons, some altruistic and some selfish. Id. citing *Circle K. Corp.*, 305 NLRB 932, 933 (1991), enfd. mem. 989 F.2d 498 (6th Cir. 1993).

The Board applies a burden shifting analysis when the employer's motivation for the alleged discriminatory action is at issue. Under Section 8(a)(3) of the Act, an employer may not discriminate regarding the hire, tenure, or any term or condition of employment to encourage or discourage membership in a labor organization. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish unlawful activity under *Wright Line*, the burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take an adverse employment action against an employee was the employee's union or other protected activity. To establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in union or concerted activity; (2) the union or concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity which must be proven with evidence sufficient to establish a causal relationship between the adverse action and the activity. See also *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2–3 (2019); *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019); *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1–2 (2020).

To support its initial burden under *Wright Line*, "the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). The General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever, in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." *Tschiggfrie Properties*, supra, slip op. at 7 (emphasis in original). "Motivation is a question of fact that may be inferred from both direct and circumstantial evidence." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (internal quotations omitted). Circumstantial evidence of discriminatory motivation may include evidence of: (1) suspicious timing; (2) false or shifting reasons provided for the adverse employment action; (3) failure to conduct a meaningful investigation of alleged employee misconduct; (4) departures from past practices; (5) tolerance of behavior for which the employee was allegedly fired; and/or (6) disparate treatment of the employee. See *Tschiggfrie Properties*, supra at slip op. at 4, 8; *Medic One, Inc.*, 331 NLRB 464, 475 (2000); *Electrolux Home Products*, supra, slip op. at 2–3 (animus shown through circumstantial evidence where the employer demonstrated open hostility to unions, employee's termination came a month after he publicly challenged an antiunion speech, employer shifted reasons for termination from a safety violation (not wearing steel toed shoes) to attendance issues).

If the General Counsel makes the required showing, the burden of persuasion then shifts to the employer to demonstrate, as an affirmative defense, that it would have taken the same

action even absent the employees' protected conduct. *Wright Line*, supra at 1089; see also *Electrolux Home Products*, supra at slip op. at 3; *National Hot Rod Assn.*, 368 NLRB No. 26, slip op. at 4 (2019) (citations omitted) (an employer need not prove the disciplined employee had committed the alleged misconduct but only needs to show it had a reasonable belief that the employee committed the alleged offense and then it acted on that belief). The General Counsel may offer proof that the employer's reasons for its decision are false or pretextual. When an employer's stated reasons are found to be pretextual, discriminatory motive may be inferred but such an inference is not compelled. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (if [a trier of fact] finds that the stated motive for discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference). An employer's defense does not fail simply because not all the evidence supports its defense or because some evidence refutes it. *Electrolux Home Products*, supra at slip op. at 3. Ultimately, the burden of proof as to the employer's motivating factor lays with the General Counsel.

*The General Counsel's Theory of Animus*

Since this theory applies to all the 8(a)(3) and (1) allegations, I will address the General Counsel's claims of general animus towards the employees' protected concerted and union activity. First, though, the record establishes that Pietanza, Judge, Vazquez, Flood, Ruiz, Smith, and Sambrano, as discussed below, have been engaged in various forms of protected concerted and union activities by their union membership, request for union representatives, hand billing, negotiating duties, participation in a sexual harassment investigation, attending group meetings, and representing employees during meetings with management. In addition, testimony from the managers indicates that they were generally aware of employees' support of the union. I disagree with Respondent's argument, only addressing Ruiz, Sambrano, Smith, and Pietanza, that they did not engaged in protected concerted activity with other employees (R. Br. at 8). While they may not have engaged in group complaints with others, they did engage in union activity as well as concerted activity while employed as further discussed.

The General Counsel's theory of animus is based on speculation and unproven allegations as related to the allegations in *this* complaint. First, the General Counsel argues that Respondent held antagonism towards all union activity at the facility, as demonstrated by a prior decision involving the Service Employees International Union Local 1107 (GC Br. at 157–158). *Valley Health System, LLC*, 369 NLRB No. 16 (2020). This argument is unpersuasive; the allegations are completely different and involve different managers and directors. Second, the General Counsel argues that because the parties have not reached an agreement on a new CBA, Respondent holds animus against the Union. The record lacks any evidence that any unfair labor practice violations involving bargaining have been found against Respondent. Third, the General Counsel argues that Respondent has not permitted grievances to proceed to arbitration after the expiration of the CBA. This decision by Respondent is well within their lawful rights and does not support a finding of animus.

The General Counsel also alleges that McKinnon harbored animus towards the Union. The General Counsel relies upon the testimonies of Wong and Shanlee Gouveia (Gouveia), and written statement of Brame (GC Br. at 158–159). The General Counsel also references

McKinnon's prior employment at Station Casinos for 3 years around 2009; Station Casinos is involved in current NLRB litigation. It is unclear how the General Counsel connects McKinnon's prior employment almost 10 years ago with animus towards the Union and its supporters in 2018 and 2019.

Wong, who worked during the swing shift, testified about numerous conversations she overheard McKinnon discussing with other individuals or conversations he had with employees. Wong testified that McKinnon told employees in a huddle that they should report any problems to Respondent rather than involve the Union (Tr. 1100). Wong could not recall when this huddle occurred. Wong also provided unclear testimony about an employee being disciplined by McKinnon for cleanliness, and McKinnon "resolving" the issue at that time rather than the employee filing a grievance (Tr. 1101–1102). Wong also claimed that she overheard McKinnon yelling at Blake about not giving an employee a reason to go to the Union. Wong testified that McKinnon told the employees during a huddle that the Union was not there to help the employees, and he made the decisions in the EVS department (Tr. 1101). Wong testified that at a meeting amongst the lead employees, McKinnon told them to inform him if they heard or saw anything about union meetings (Tr. 1103). McKinnon denies that he ever asked lead attendants to report union activity (Tr. 1420). I decline to credit any of Wong's testimony regarding McKinnon's alleged union animus. Although Wong is a current employee who is testifying against her economic interest, Wong's testimony about animus was vague and unclear. Wong's testimony was not corroborated by any other swing shift employees including current employees Flood and Judge.

Regarding Gouveia, I decline to credit any of her testimony despite her continued employment with Respondent; simply because an individual continues to work for the employer she testifies against does not automatically require a fact finder to credit her testimony. Gouveia has worked for Respondent since April 15, 2019; she began as a housekeeping attendant II lead but then became a utility attendant (Tr. 2071–2072). Procedurally, her testimony was not appropriate as rebuttal testimony as argued by Respondent (R. Br. at 27–28). She testified about completely new incidents, rather than directly rebutting evidence presented during Respondent's case–in–chief. *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177 fn. 1 (2000) (ALJ did no abuse discretion by rejecting exhibits presented in rebuttal when the exhibits could have been presented earlier). CGC certainly could have called her on their direct case-in-chief but failed to do so. But even if I were to consider her testimony, it was confusing and unfocused.[43] Even more suspicious was her inability to get through her direct examination without breaking down several times due to her emotions but during cross-examination she suddenly became steely and could not recall events. I cannot credit Gouveia's testimony.

Finally, the General Counsel relies upon Thorne's typed summary of her conversation with Brame for the sexual harassment investigation. Brame did not testify, and his statement is

[43] Gouveia testified that she became at utility attendant on August 19, 2019 but denied applying for a new bid (Jt. Exh. 17). She claims that McKinnon wanted her to sign a paper to get employees Toni (last name unknown) and Judith Zacharias (Zacharias) fired because they were union supports but she did not want to lie so he took away her lead position (Tr. 2079–2080). She testified that when she began in April 2019, McKinnon told her that he wanted to walk certain employees and the union out of Respondent (Tr. 2090–2091). McKinnon would brag about being a union buster (Tr. 2090–2091). Again, similar conversations occurred in May and June 2019 (Tr. 2093, 2097, 2100).

hearsay and cannot be credited so it does not support a finding of animus towards employees' protected concerted and union activities.

Thus, the General Counsel largely bases animus on the testimony of two incredible witnesses, and notes from the human resources director about her conversation with another manager. After discrediting the above claims of animus, I will engage in a *Wright Line* analysis for each discriminatee with any specific claims of animus based on the employees' protected concerted and/or union activity.

1. Complaint pars. 7(a)(4) through (8), 7(b)(6) through (9), 7(c)(2) and (3), and 7(h)(4): Andrew Pietanza

Pietanza worked at Respondent as an EVS attendant on the day shift from June 21, 1991, to April 17, 2019 when he was terminated due to poor performance (Tr. 765, 785, 1854). For the last 15 years of his employment, Pietanza worked in the surgical intensive care unit (SICU) which includes the recovery area (PACU) and endoscopy (Tr. 765, 1508–1509).[44] Pietanza also cleaned the medication rooms, bathrooms, utility rooms, and nurses' stations and replaced supplies (Tr. 773). Like all other EVS employees, Pietanza used a daily assignment sheet to indicate when he started and finished cleaning a patient room or area (GC Exh. 60). After Blake and McKinnon became Pietanza's supervisors, Pietanza testified that they would send him to different areas in the facility to clean (Tr. 780–781). Pietanza was also a member of the Union, wore a union button on his uniform, and participated in passing out union flyers outside the facility on January 24, 2019. Millet admitted that Pietanza was a union member (Tr. 134).

As background, Respondent issued Pietanza a preventative counseling on July 3, 2018, and a written warning on July 30, 2018 (GC Exh. 14). And as discussed previously, I find that Respondent violated Section 8(a)(1) when McKinnon told Smith, during Pietanza's grievance meeting on November 12, 2018, to shut up.

<u>October 26, 2018: Final Written Warning</u>

Thereafter, on October 22 and 26, 2018, Blake testified that Millet, McKinnon, and he inspected patient rooms assigned to Pietanza for cleaning due to continual complaints from the unit manager that the cleaning was deficient (Tr. 1340–1341, 1595). As part of its investigation, Respondent took photos of the deficiencies in the rooms (R. Exh. 2: Tr. 1343–1346, 1596). Due to the results of the investigation and after speaking with human resources, McKinnon decided to issue a final written warning on October 26, 2018, to Pietanza because the sanitation levels in the patient rooms assigned to him for cleaning were unacceptable (Tr. 1346).[45] Pietanza commented

[44] CGC alleges that McKinnon added more duties to Pietanza's workload by including the PACU area along with the cath lab, overflow and 3 Tower (GC Br. at 170). However, as stated previously, Pietanza's testimony was often unclear such as where he worked, and how often he cleaned these areas. Pietanza testified that a few years ago he was asked to do "favors" to clean the trash in the PACU or a room in the overflow (Tr. 779). In response to leading questions, Pietanza testified that he was sent to other areas by McKinnon and Blake (Tr. 781–782). In contrast, McKinnon testified that Pietanza's assigned areas were SICU and endoscopy which included PACU as endoscopy and PACU were in the same areas (Tr. 1509). McKinnon testified that they tried to explain to Pietanza that his area to clean included PACU (Tr. 1509). I credit McKinnon's testimony as to the areas in which Pietanza was responsible on a continual basis.

[45] CGC states in the posthearing brief that this disciplinary action was misidentified as occurring on September 18,

on the final written warning that he took responsibility but did his best due to being busy (GC Exh. 14). McKinnon testified that when Pietanza was presented with the final written warning, Pietanza blamed other supervisors and managers in the facility, claiming that they did not like him and were harassing him.[46] McKinnon testified that he showed Pietanza the photos to support the disciplinary action and offered Pietanza training which he refused (Tr. 1346–1347). Pietanza did not testify about the October 26, 2018 disciplinary action issued to him.

November 30, 2018: Closer Supervision and Increased Work Assignment

On November 30, 2018, McKinnon, Blake, and Millet received complaints about the cleanliness of the SICU.[47] Thus, they inspected the area along with Respondent's executives and government inspectors who were also inspecting the facility (Tr. 1351–1352). After the inspection, McKinnon approached Pietanza with Millet and Blake. They asked Pietanza if he had used a certain equipment to clean the floor, but Pietanza had not and had never used the equipment. McKinnon, Millet, and Blake told Pietanza that the floors needed to be cleaned with this equipment once a week, and they offered training. Pietanza responded that McKinnon, Millet and Blake were bullying him (Tr. 801–802).[48]

McKinnon testified that as they spoke to Pietanza about the deficiencies, he became loud and defensive. Thus, they moved the meeting into the EVS office (Tr. 1352, 1599–1600). On the way, McKinnon asked Walker to join them in the EVS office as a union representative for Pietanza since he asked for a witness and McKinnon understood that Walker was a shop steward (Tr. 1352, 1658, 1707; R. Exh. 3 and 4). McKinnon testified that Pietanza accused management of bullying and harassing him (Tr. 1353). McKinnon testified that during this meeting with Pietanza, Respondent had offered to retrain him (Tr. 1314, 1353). Walker then recommended Pietanza accept the training, but he became upset with her and felt he should not be retrained (Tr. 1314–1315, 1708).[49]

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2018 (GC Br. at 171 fn 55).

[46] CGC's argument that McKinnon added many more duties to Pietanza's workload to be able to "target" him is undermined by Pietanza's contemporaneous comments on his disciplinary actions that he took responsibility and blamed others. Pietanza never responded that he had been added additional areas of responsibility at this point.

[47] McKinnon, Millet and Blake took contemporaneous notes of the events of November 30, 2018 (R. Exh. 3, 4 and 5). These notes are consistent with one another and consistent with their testimonies. However, the notes are not so similar as to appear to have been drafted as a group. The notes have enough differences which are to be expected from three peoples' observations. The consistency with the notes and testimony enhances the credibility of McKinnon, Millet, and Blake whom I credit rather than the testimony of Pietanza.

[48] Pietanza alleged that McKinnon told Pietanza that "the boss" was not happy with Pietanza, that Pietanza would need to use the "cleaning machine" in the unit, and that McKinnon pointed at him repeatedly with his finger (Tr. 800–801). Pietanza also claimed that McKinnon, Millet and Blake "surrounded him" and forced him to walk to the EVS office. As set forth above, I do not credit Pietanza's testimony and instead credit the testimony of McKinnon, Blake, and Millet whose testimony was confirmed by their contemporaneous notes.

[49] Pietanza testified that he did not want Walker to represent him (Tr. 803–804). He alleged that Walker was holding his arms trying to calm him down, and that Walker made him feel as though he were "acting out" while the managers offered him water, making him appear as though he were "bad" or "angry" (Tr. 804). Walker told Pietanza that maybe he should be retrained and spoke to him like he was "a little kid" (Tr. 805). While Walker did not testify, I cannot credit Pietanza's testimony. As explained above, Pietanza was not a credible witness. Much of his testimony focused on blaming others and the bullying he allegedly suffered but there was no evidence to support such claims.

January 2, 2019: Final Written Warning

On December 28, 2018, Blake, McKinnon, and Millet asked to see Pietanza's assignment sheet to learn which two rooms he had finished cleaning but Pietanza had not completed this assignment sheet. When they learned which rooms he cleaned, they inspected the rooms and found performance deficiencies.[50] As a result of these deficiencies, on January 2, 2019, Pietanza was given another final written warning for performance issues on November 30, 2018, and December 28, 2018. In this disciplinary action, Respondent noted that Pietanza refused training on October 26, 2018 (GC Exh. 14). McKinnon testified that he issued Pietanza another final written warning because he wanted to convince Pietanza that his performance was unacceptable (Tr. 1355–1356). Respondent took photos of the deficiencies in the rooms on December 28, 2018, to support the disciplinary actions (R. Exh. 7; Tr. 1357–1366). McKinnon testified that he added the narrative to the photos on the day the photos were taken when creating the disciplinary "package" which included the supporting documentation for the discipline (Tr. 1361). This disciplinary file is maintained in the EVS department until the file is moved to human resources (Tr. 1361). When Blake presented Pietanza with the final written warning, Smith attended the meeting as Pietanza's representative (Tr. 808). In addition, Pietanza's final written warning required mandatory training on floor, daily and discharge cleaning (GC Exh. 14).

January 24, 2019: Closer Supervision

On January 24, 2019, Pietanza testified that Blake and a lead named Jennifer Prodder (Prodder) came into his unit and started "badgering" him saying that they would watch Pietanza clean his last two rooms (Tr. 910–911).[51] Blake, McKinnon, and Prodder checked his patient room cleaning and commented that he missed something on the floor (Tr. 811). Around this time, Pietanza completed a series of written trainings which were required as part of his employment (GC Exh. 15; Tr. 1366). Blake testified that Millet and he watched Pietanza clean a room and offered tips on how he could improve including not using the same rag which could spread infection (Tr. 1609, 1670). Pietanza responded that he knew how to clean as he had been doing for numerous years (Tr. 1669). Blake and Millet observed Pietanza to ensure that he was cleaning the rooms properly in a prompt amount of time (Tr. 1610). Blake testified that even though Pietanza was terminated 4 months later, the managers continued to check his performance which remained inconsistent (Tr. 1670–1671).

February 2019: Increased Work Assignment

A week after participating with other employees to pass out union flyers outside the facility, around late February 2019, Pietanza testified that Blake told him that he would need to clean four patient rooms in three hours (Tr. 814). Pietanza testified that he asked Blake if his instructions had anything to do with his participation in passing out flyers the prior week (Tr. 815). Blake did not respond except to say that he needed to clean the rooms. Thereafter, Blake

[50] Pietanza testified that Blake and Millet were watching him clean a room, and they were whispering and laughing at him from outside the room (Tr. 808). Blake made a note of this incident on or about December 28, 2018 (R. Exh. 9). Again, Pietanza's testimony demonstrates that although McKinnon and the managers were inspecting rooms as part of their duties, Pietanza suggests nefarious purpose behind their actions. I see no evidence of such actions, and instead note that they were simply performing their job duties.

[51] Prodder did not testify.

and McKinnon inspected Pietanza performance in cleaning those patient rooms. Blake called Pietanza to come to the patient rooms they had inspected. McKinnon then told Pietanza that he had failed the inspection. Pietanza remarked that the floors had been damaged for some time, and Pietanza took a picture of the floor (Tr. 816).[52] McKinnon testified that Pietanza would only have been assigned additional rooms to clean if there was a need at the facility due to patient load (Tr. 1419–1420).

March 26, 2019: Closer Supervision

As discussed previously, on March 26, 2019, Blake, Cox, and McKinnon conducted an inspection of Pietanza's work area with a patient experience employee who is responsible for ensuring a good facility experience for patients. During this inspection, they found numerous deficiencies (R. Exh. 13).

March 27, 2019: Closer Supervision and "Discipline"

The following day, on March 27, 2019, Blake and Millet commenced a retraining program for Pietanza, which they documented (R. Exh. 15; Tr. 1700). In this "retraining program," Millet and Blake observed Pietanza perform his duties, and then they documented what they observed including several deficiencies. Pietanza later signed this document.

April 15, 2019: Closer Supervision

On April 15, 2019, Blake and McKinnon inspected Pietanza's work in the SICU. Again, Pietanza's cleaning showed multiple deficiencies. They each wrote contemporaneous statements documenting their observations and conversation with Pietanza (R. Exhs. 18 and 19). Both notes document splatters of liquid on the walls, buildup of dirt and debris and syringe caps on the floor, failure for the floors to be swept or mopped to standard, and the white board being soiled. McKinnon also took photos of the unclean areas in the room Pietanza cleaned (R. Exh. 17; Tr. 1373–1374). However, Blake's inspection report only reflected "debris and caps under dresser, around corner of room" with no other deficiencies including the whiteboard being properly wiped off and walls free of marks and smudges (R. Exh. 20; Tr. 1621, 1645–1648).[53] When questioned on cross-examination about this discrepancy, Blake testified that the pictures should have reflected the problems observed and could not explain why the inspection report indicated that there were no problems with the walls (Tr. 1649–1650, 1676). The pictures to support the termination include photos of liquid on the walls and the whiteboard not being cleaned (R. Exh. 17). Pietanza recalled that McKinnon made a comment about trying to help out Pietanza, and Pietanza responded that McKinnon was "union busting" (Tr. 827).

[52] This picture was not entered into evidence at the hearing.

[53] McKinnon's notes reflect similar deficiencies noted by Blake in his notes (R. Exhs. 18 and 19). Blake denied coordinating with McKinnon to write their statements but admitted they discussed their statements before writing them (Tr. 1653–1655).

April 17, 2019: Termination

On April 17, 2019, McKinnon and Blake met with Pietanza as well as Porchia who served as his representative (Tr. 828).[54] McKinnon and Blake presented Pietanza with the termination action due to substandard performance on April 15, 2019. McKinnon testified that not only was he present during the inspection, but that he drafted the termination and spoke with human resources (Tr. 1367). During this meeting, Pietanza responded that his termination had nothing to do with keeping the facility clean but was about union busting (Tr. 828–829). Pietanza then asked for his work assignments from the prior 30 days but McKinnon refused (Tr. 829). On the written termination, Pietanza wrote that Blake had been bullying him and setting him up to fail with too many areas to complete. Pietanza also complained that he was being harassed, intimidated, and discriminated (Tr. 831; GC Exh. 14).[55] At the hearing, Pietanza testified that McKinnon's behavior toward other employees was like how he treated himself (Tr. 865–867).

*Credibility*

The entire focus of Pietanza's testimony was his conviction that McKinnon and Blake wanted to remove the Union and him from the workplace. Otherwise, Pietanza lacked focus during his testimony and provided very few concrete details as to what occurred during his interactions with management. He spoke in a nonsensical manner. He often could not recall who was present during these various interactions. His testimony was all over the place and I did not rely on his testimony. Pietanza, on cross-examination, would not answer the question asked, became extremely defensive and did not deny the accusations made against him. Thus, I rely upon the documentary evidence as well as testimony of McKinnon and Blake.

*Legal Analysis*

In complaint paragraph 7(a)(4) through (8), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) when the EVS director and managers closely supervised Pietanza on November 30, 2018, January 24, 2019, March 26 and 27, 2019, and April 15, 2019. In complaint paragraph 7(c)(2) and (3), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) when Pietanza was given increased work assignments on November 30, 2018, and in or around March 2019. In complaint paragraph 7(b)(6) through (9), and 7(h)(3), the General Counsel alleges Respondent discriminatorily disciplined Pietanza on October 26, 2018, December 28, 2018, January 2, 2019, and March 27, 2019, and terminated him on April 17, 2019.

CGC argues that Pietanza's protected concerted and union activity included his union membership, wearing a union button to work, and participating in hand billing (GC Br. at 170). CGC argues that Respondent had animus towards Pietanza's union activity due to refusing him an effective union representative (GC Br. at 170). Counsel for Respondent argues that Pietanza did not engage in protected concerted activity, and even if Pietanza had engaged in protected

[54] Smith had been terminated by Respondent on February 3, 2019.

[55] On June 3, 2019, Pietanza filed a complaint with the Nevada Equal Rights Commission alleging that his termination was due to his age, national origin, and retaliation (Tr. 1854–1855; R. Exh. 91).

concerted activity, Respondent was unaware of such activity (R. Br. at 7–10). Counsel for Respondent further argues that Pietanza was terminated for legitimate reasons (R. Br. at 15–16).

Pietanza engaged in union activity when he participated in the hand billing events at the facility on February 15, 2019, when wearing his union button on his work attire every day, and when he requested union representation during his November 12, 2018 step 1 grievance meeting. Thus, I find that Pietanza engaged in protected concerted activity while employed by Respondent. Moreover, I find that McKinnon and the EVS managers were aware of Pietanza's union activity due to his wearing of his union button as well as his request for a union representative at the November 12, 2018 grievance meeting. Millet also admitted that he knew Pietanza was a union member. The record is unclear whether McKinnon and the EVS managers observed Pietanza hand billing on February 15, 2019. However, based on the various witness' testimonies, it appears that many EVS employees were union members and Respondent would likely have had awareness of Pietanza's membership.

Next, I will evaluate the General Counsel's theory that animus towards Pietanza's activity was a substantial or motivating factor in Respondent's treatment of Pietanza. The General Counsel argues that Respondent's violation of Section 8(a)(1) and change to the bid sheets demonstrates animus[56] (GC Br. at 170).

The facts and circumstances do not support a causal relationship between Pietanza's protected activity and his disciplinary actions. Respondent's discipline of Pietanza for his performance issues began in July 2018 and continued until his termination in April 2019. During this same time, there is only one event, connected to Pietanza, where Respondent is found to have violated Section 8(a)(1) when McKinnon told Pietanza's representative Smith to shut up at a grievance meeting on November 12, 2018. While animus may be found due to McKinnon's violation of the Act on November 12, 2018, there is still no link between that violation and the subsequent disciplinary actions due to performance, closer supervision, and increased work assignments given to Pietanza. Respondent's supervision of Pietanza was no different from the other employees in the EVS department. Blake testified that the managers would inspect several rooms each day to ensure that the areas were being cleaned to standards. Pietanza did not dispute that he did not clean the areas assigned appropriately; he constantly complained that everyone, including nurses and unit managers, who complained about his cleaning were bullying and harassing him. Moreover, it is reasonable that McKinnon and the EVS managers inspected Pietanza's assigned areas even more than other employees due to the complaints they received in October 2018 and late November 2018 from other components from the facility. Closely supervising an employee due to union activity violates the Act. *T & T Machine Co.*, 278 NLRB 970, 973 (1986). Here, there is no evidence linking Pietanza's union activity with Respondent's supervision of his work.

Furthermore, there is no evidence that McKinnon or any other EVS manager observed Pietanza passing out hand-bills in late February 2019. But even if they did, again, there is no connection with the discipline he received. By January 2, 2019, Respondent gave Pietanza a second final written warning for performance deficiencies. The General Counsel alleges that Respondent tried to create progressive disciplinary actions to terminate Pietanza by also

[56] The change to the bid sheets is discussed later in this decision.

increasing his work assignments. It is unlawful to assign more onerous duties to employees and isolate them in retaliation for their engaging in activities protected by the Act. *Wellstream Corp.*, 313 NLRB 698, 706 (1994). But the credited evidence shows that Pietanza was given additional areas to clean, just as other employees were given, when the need arose in the facility. Blake did not permanently increase Pietanza's assigned duty area but asked him to clean extra rooms on 1 day in February 2019. Despite receiving two final written warnings, Blake and Millet attempted to retrain Pietanza. Pietanza then would claim harassment or union busting. But the record does not support his accusations. Finally, Respondent terminated Pietanza on April 17, 2019. Pietanza admitted at the hearing that McKinnon treated everyone the same. Respondent's decisions to inspect Pietanza's work, to assign additional areas to clean at times, and to discipline him were all based on legitimate business needs, and there is no evidence of unlawful motivation due to union and protected concerted activity.

Thus, the General Counsel failed to establish a prima facia case of discrimination regarding Pietanza as alleged in complaint paragraphs 7(a)(4) through (8), 7(c)(2) and (3), 7(b)(6) through (9), and 7(h)(3).

2. Complaint pars. 7(a)(1) through (2), 7(b)(4) and (5), and 7(c)(1): Joanne Judge

EVS attendant Judge is a current employee who works on the swing shift and during the relevant time was an active union member who became part of the negotiating committee in April 2019, passed out union flyers, represented employees during investigatory meetings, and wore a union button (Tr. 1187, 1190; GC Exh. 68).[57] Millet and Cox admitted that Judge was a union member who would wear her union button (Tr. 136, 386, 389–390). Judge participated in the November 2018 group meeting with Irwin to complain about McKinnon's management style. Furthermore, Judge and Villalobos complained to Irwin on April 25, 2019, about Cox's sudden enforcement of the dress code. Thereafter, on May 2, 2019. McKinnon informed the employees that he would be enforcing the dress code immediately.

December 2, 2018: Closer Supervision and Increased Work Assignments[58]

Judge testified that in December 2018, Cox, Rubio, and Millet instructed her after the huddle meeting to clean a room. After Judge finished cleaning the room, Cox and Rubio came to inspect the room she cleaned, asked her questions, and left the room commenting that she had done a good job (Tr. 1161). Also, in December 2018, Judge testified that as she cleaned a room, she turned and saw Millet in the doorframe of the room watching her work (Tr. 1162).

Judge also testified that in December 2018 McKinnon informed the employees that they would no longer stay in their assigned work areas but would be told by Respondent to help other employees when they are done with their assigned areas (Tr. 1144).

[57] On November 18, 2019, after Smith, Porchia, and Griffin were no longer working at Respondent, Judge decided to remove herself from all union activity including no longer wearing her union button (Tr. 1192–1193). Judge testified that a few weeks later, McKinnon commented that she was not longer negotiating the CBA (Tr. 1194). Judge testified then she became the "star" employee, no longer receiving disciplinary actions, and no inspections of her work (Tr. 1194).

[58] CGC does not set forth any argument to support the allegation that in December 2018, Respondent increased Judge's work assignment.

December 12, 2018: Preventative Counseling

On December 12, 2018, Judge testified that Rubio and Millet gave her a preventative counseling for wearing headphones during her work shift. Judge disagreed and told them she was wearing her headphones while coming out of the restroom during her lunch break. Judge then asked for Smith as her union representative (Tr. 1163–1164). But Millet told Judge that Smith was not available (Tr. 1164). Judge refused to sign the document, and Rubio told Judge that Smith was in the linen room. Judge quickly got Smith to come to the meeting, explaining to her what had happened. Judge then received the preventative counseling (Tr. 1165).

On December 22, 2018, Judge asked to speak to McKinnon about her write-up. Judge asked for Smith's presence during the meeting, but McKinnon told Judge that Smith was not available. Judge testified that McKinnon often told the employees that Smith was not available (Tr. 1536–1537). After McKinnon offered the lead attendant as a representative for Judge and Judge declined, the meeting commenced. At the meeting's conclusion, McKinnon removed the disciplinary action issued to Judge (Tr. 1166–1167).

January 2019: Closer Supervision

In January 2019, Judge testified that Cox and Millet commented to her that they had been inspecting the rooms she cleaned but did not find any problems (Tr. 1167–1168).

May 27, 2019: Level 2 Written Warning[59]

On May 17, 2019, Judge informed lead EVS attendant Wong that she could not finish cleaning a room due to its condition and that she needed cleaning supplies for her cart (Tr. 1178–1179). Wong told Judge to clean the room as best as she could. Later that day, Wong told Judge that Rubio, Millet, and she inspected the room (Tr. 1179).[60]

Ten days later, on May 27, 2019, Rubio and Millet issued Judge a written warning for deficiencies in the cleaning of that room based on an inspection (Tr. 180; GC Exh. 22).[61] During a subsequent huddle, Rubio and Millet told the employees that they were giving them a verbal warning that all rooms should be detailed (Tr. 1180). Judge testified that she spoke up during this meeting because she had been given a written disciplinary action while the other employees were only given a verbal warning. Judge complained that the employees did not have access to cleaning supplies, to which they were told to inform their lead attendant to get the needed supplies (Tr. 1180). Judge disagreed with the discipline, complaining that they are understaffed, not properly trained, and all rooms need to be urgently cleaned with the addition of floor care duties (GC Exh. 22).

[59] The complaint references a disciplinary action issued to Judge on June 5, 2019. No disciplinary actions were issued to Judge on June 5, 2019, but instead on May 27, 2019.

[60] Wong has worked at Respondent since September 2014. On June 10, 2019, Wong warned Judge that McKinnon, Blake, and Millet needed Judge to increase her productivity, and Wong advised Judge to be careful and clean more rooms because she was being targeted (Tr. 1186, 1205). Wong's advice to Judge did not come from McKinnon but based on her own opinion (Tr. 1117).

[61] The written warning references a preventative counseling for a performance issue given to Judge on September 26, 2018. This disciplinary action is not in the record, and there is no evidence as to what it concerned.

On June 5, 2019, Judge met with McKinnon and Rubio to discuss the May 27, 2019 disciplinary action issued to her. After Judge complained, McKinnon told Judge that not only should she communicate her issues in cleaning room with the lead attendant, but she should also document the problem on her daily assignment sheet (Tr. 1183). The meeting ended, and McKinnon would not remove the disciplinary action. On June 6, 2019, Judge spoke to Thorne about the May 27, 2019 disciplinary action issued to her, but Thorne could not overturn the disciplinary action.

*Credibility*

As previously explained, I found Judge to be a highly credible witness. She not only continues to work for Respondent, which enhances her credibility, she testified with details and remained consistent during cross-examination. I rely upon her testimony for these set of findings of fact.

*Legal Analysis*

In complaint paragraphs 7(a)(1) through (2), 7(b)(4) and (5), and 7(c)(1), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) when the EVS director and managers closely supervised Judge on December 2, 2018, and in January 2019; when disciplining Judge on December 12, 2018, and June 5, 2018; and increasing Judge's work assignments in December 2018.

CGC argues that Judge's protected concerted and union activity included her Union membership, complaint to human resources in November 2018, membership on the bargaining team, and raising concerns regarding the implementation of the dress code policy (GC Br. at 178). CGC argues that Respondent had animus towards Judge's union activity including complaint about the implementation of the dress code policy (GC Br. at 178). Counsel for Respondent does not set forth any specific argument addressing the allegations involving Judge.

Judge engaged in union activity when she wore her union button on her work attire every day, and when she began participating in bargaining in April 2019. McKinnon, Millet and Cox were aware of Judge's union activity. Judge also participated in protected concerted activity when she and a group of employees went to human resources in November 2018 to complain about McKinnon's management style. She also participated in protected concerted activity when Villalobos and she complained to human resources about the dress code policy. The record is void of evidence that McKinnon or any EVS supervisor knew about the November 2018 meeting, but circumstantial evidence shows that McKinnon and Cox likely knew about Judge and Villalobos' complaint to human resources in April 2019 about the dress code policy.

Next, I will evaluate the General Counsel's theory that animus towards Judge's protected concerted union activity was a substantial or motivating factor in Respondent's treatment of Judge. Again, I find that the General Counsel has failed to sustain their burden of proof that Judge's protected concerted and union activity was a motivating factor in the decision to discipline her on December 12, 2018, and May 27, 2019, and to supervise her closely on December 2, 2018, and in January 2019.

McKinnon and Blake testified about the numerous inspections that the managers conduct daily as a routine part of their duties as management. The inspection of Judge's assigned area on December 2, 2018, and in January 2019 is not different from other inspections they conducted. The General Counsel also failed to present any evidence that in December 2018, Respondent assigned additional work to Judge. Judge only testified that McKinnon announced that employees would be assigned other areas to clean when needed. Furthermore, there is no evidence that McKinnon was aware of the group complaint to Irwin in November 2018 about his management style. Even if he was made aware of the meeting, there is no indication he knew who participated in the group complaint. McKinnon also removed Judge's preventative counseling issued by the EVS managers on December 22, 2018. Removal of a disciplinary action does not indicate animus by McKinnon for Judge's protected concerted and union activity. Thus, the General Counsel has not shown any connection between Judge's Section 7 activity with the decision to issue and rescind a disciplinary action in December 2018 and to inspect her cleaning in January 2091.

In April 2019, Judge testified that she decided to be on the Union bargaining team since Smith had been terminated. Around this same time, McKinnon and the EVS managers sought to enforce Respondent's long-standing dress code policy. Judge questioned the enforcement of the policy by speaking to Irwin. Ultimately, McKinnon told the employees that the dress code policy would be enforced, and Judge received an exemption due to a doctor's note. During this same time, Rubio and Millet issued Judge a written warning for performance deficiencies in a room she was assigned to clean 10 days prior. In her disagreement with the discipline, Judge complained about the understaffing, lack of training, and increased workloads. McKinnon would not rescind the discipline. Although the timing may be suspicious due to her push back on the enforcement of the dress code policy, I again find no animus by McKinnon, Rubio, or Millet when issuing Judge the May 27, 2019 disciplinary action. As has become clear on the entire record, McKinnon and the EVS managers inspected and disciplined many employees after they started supervising the employees. The discipline issued to Judge in May 2019 is no different from their management practice. In fact, Judge had been disciplined in September 2018 for performance as well, but there is no evidence in the record regarding the specific facts of that disciplinary action. Wong's statements to Judge in June 2019 were based on her own opinion, and not from direct statements from McKinnon. Based on the totality of the facts presented, the General Counsel has not supported its burden of proof that Judge's Section 7 activity was a motivating factor in the supervision and discipline of Judge.

Thus, the General Counsel failed to establish a prima facia case of discrimination regarding Judge as alleged in complaint paragraphs 7(a)(1) through (2), 7(b)(4) and (5), and 7(c)(1).

3. Complaint pars. 7(a)(10), 7(b)(10) and (11), 7(c)(5) through (7), 7(d)(3) and (4): Oilda Vazquez

Vazquez worked at Respondent as an EVS attendant II on the graveyard shift from August 8, 2016, through May 5, 2019 when she resigned (Tr. 517). Vazquez was a member of the Union, participated in passing out handbills in approximately March 2019, and wore a union button (Tr. 517). Millet admitted that he knew Vazquez was a union member (Tr. 131). Vazquez

also requested the representation of Smith during a December 17, 2018 meeting with McKinnon as well as Porchia as her representative during a March 20, 2019 meeting with McKinnon; I have previously found violations of Section 8(a)(1) of the Act when McKinnon refused Vazquez representation on December 17, 2018, and refused her representative of choice on March 20, 2019. In addition, Vazquez participated in the sexual harassment investigation of McKinnon between May and June 2018. Vazquez also complained about McKinnon's treatment of the employees on around December 17, 2018, and filed an anonymous UHS complaint and a Nevada Equal Rights Commission complaint in early January 2019. Moreover, Vazquez went to the NLRB office with other employees in early January 2019.

December 17, 2018: Increased Work Assignments[62]

As discussed above, on approximately December 17, 2018, Vazquez asked Smith to represent her in a meeting with McKinnon so she could discuss the addition of stripping and waxing the floors during her shift. McKinnon told Vazquez during the subsequent meeting she had with him, without the representation of Smith, that her position description called for her to strip and wax the floors. The position description shows that floor care or cleaning in specialized area is preferred (GC Exh. 73). The expired CBA also lists floor care as a responsibility for housekeeping attendants. McKinnon testified that heavy equipment must be used to strip and wax floors, and the process can take some time to complete (Tr. 68).

February 11, 2019: Preventative Counseling and Disparate Administration of FMLA

On February 11, 2019, Rubio gave Vazquez a preventative counseling for attendance issues, dating back to 2018 (GC Exh. 18). Vazquez testified that according to the preventative counseling because she had accumulated over 12 points, she should have been terminated in 2018 based on the expired CBA. However, when she spoke to Irwin, Irwin reduced the points on the preventative counseling to 9. Even with 9 points, Vazquez testified that she should have been terminated. Vazquez also testified that she had been approved previously for intermittent FLMA leave.[63] Irwin told Vazquez that she was not terminated, but only given a preventative counseling (Tr. 572–573). Vazquez also submitted a written incident report to Irwin regarding the attendance preventative counseling and again claimed that McKinnon was retaliating against her for the sexual harassment claim (Tr. 574–575; GC Exh. 56). Vazquez spoke to Smith after she spoke with Irwin (Tr. 576). Because Vazquez had not been given an assignment sheet, she detailed what cleaning she had performed on her shift (GC Exh. 70 and 71). On March 19, 2019, Sedgwick approved Vazquez for FMLA leave between February 28, 2019, to August 31, 2019 (GC Exh. 74).

March 20, 2019: Preventative Counseling, Closer Supervision, and Disparate Administration of FMLA

On March 20, 2019, Millet issued Vazquez a preventative counseling because she failed to notify her supervisor at least four hours prior to her shift that she planned to be late or absent. Vazquez commented on the disciplinary form that she has telephoned her manager at 10:09 p.m.

[62] The complaint alleges that this incident occurred on December 12, 2018, but the record appears to indicate that this occurred on December 17, 2018.

[63] The record contains no evidence of FMLA approval prior for Vazquez prior to February 28, 2019 (GC Exh. 74).

which was less than one hour prior to her work shift and that she had intermittent FMLA leave (GC Exh. 2). As discussed previously, during this meeting, Vazquez testified that Millet showed her photos from February 2019 where she had not properly cleaned a room, but he did not provide her any disciplinary forms at that time (Tr. 583–584). Vazquez also testified that McKinnon threatened her with termination due to insubordination if she continued to ask for an explanation regarding the FMLA leave (Tr. 586). After the meeting, Vazquez again went to speak with Irwin on March 20, 2019, and submitted a statement of what occurred during the meeting with McKinnon (GC Exh. 58). McKinnon did not recall many details from this meeting except that Vazquez asked for more training (Tr. 83–84).

McKinnon testified that on April 5, 2019, Vazquez resigned from Respondent, stating that she had been offered a higher salary at another company (Tr. 87, 176). However, Vazquez submitted a letter to Thorne stating that she resigned due to "constructive discharge tactics" by McKinnon (GC Exh. 19). Vazquez also wrote, "I already complained to you and my Director and I have not been heard. I don't think there's an OPEN door policy any more. I have Talk to my Director before and found myself in a position for been dissent, that he could take my opinions as an insubordination and still could lead me to a termination" (GC Exh. 19).

*Credibility*

As discussed previously, I credit Vazquez' testimony. Vazquez' testimony is corroborated by her contemporaneous statements to human resources. Thus, I rely upon the testimony of Vazquez.

*Legal Analysis*

In complaint paragraphs 7(a)(10), 7(b)(10) and (11), 7(c)(5) and (7), 7(d)(3) and (4), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) when the EVS director and managers closely supervised Vazquez in March 2019; when disciplining Vazquez on February 11, 2019, and March 20, 2019; increasing Vazquez' work assignments on December 17, 2018 and April 2, 2019; and disparately administering FMLA leave on February 11, 2019, and March 20, 2019. CGC argues that Respondent had animus towards Vazquez' request for Smith as her representative in December 2018 and request for a specific representative in March 2019 as well as for her participation in the sexual harassment investigation of McKinnon (GC Br. at 175). CGC further argues that Respondent retaliated against Vazquez for her union support and protected concerted activity (GC Br. at 177–178). Counsel for Respondent does not set forth a specific argument addressing the allegations involving Vazquez.

Vazquez engaged in union activity due to her participation in passing out handbills, requests for a union representative during meetings on December 13, 2018, and March 20, 2019, and when she wore a union button to work. Obviously, Respondent via McKinnon would have been aware of her assertion of her Section 7 rights when she requested a union representative. Millet also testified that he was aware of her union activity. Vazquez engaged in protected concerted activity when she participated in the sexual harassment investigation of McKinnon in May and June 2018, when she complained about McKinnon's treatment of the employees on around December 17, 2018, and filed an anonymous UHS and Nevada Equal Rights Commission

complaint in early January 2019. Moreover, Vazquez engaged in protected concerted activity when she went to the NLRB office with others in early January 2019.

Next, I will evaluate the General Counsel's theory that animus towards Vazquez' protected concerted union activity was a substantial or motivating factor in Respondent's treatment of Vazquez. Once again, the General Counsel has failed to prove that McKinnon and the EVS managers actions towards Vazquez were motivated by her protected concerted or union activity. Vazquez' involvement in the sexual harassment investigation of McKinnon occurred in June 2018. Almost 6 months later, Vazquez complained when McKinnon added the duties of floor care to her assignment. As stated previously, it is unclear to what extent McKinnon knew who was involved in his sexual harassment investigation. It has not been proven through direct or circumstantial evidence that McKinnon knew who was involved in that complaint against him. Also, the record shows that other employees, such as Judge, were added the duties of floor care, which is a task assigned to housekeeping attendant II per the position description and expired CBA. While it is unlawful to assign more onerous duties in retaliation for Section 7 activity, here, the evidence does not support the General Counsel's theory.

Before she was disciplined on February 11, 2019, for attendance issues, Vazquez filed an anonymous UHS complaint against McKinnon as well as a complaint with the Nevada Equal Rights Commission. The record lacks any evidence that McKinnon would have been aware of her complaint because one was anonymous and the other was sent to the parent company of Respondent. Thus, Vazquez' discipline for attendance in February 2019 cannot be shown to be motivated by her Section 7 activity. I also cannot find any evidence of disparate administration of FMLA. The General Counsel only set forth evidence that Vazquez was approved for FMLA after February 28, 2019, not before February 11, 2019, when she was issued a preventative counseling.

Finally, on March 20, 2019, the same day she requested a different union representative than the one provided to her, she was issued a preventative counseling again for attendance issues where she did not call ahead to be absent within the call-in period. The General Counsel also claims that Vazquez was being closely supervised in February 2019, but as stated previously, the EVS managers routinely inspected the employees work areas to ensure cleanliness standards were followed.

Although Vazquez participated in Section 7 activity, the General Counsel has failed to prove that Respondent's actions were motivated by animus towards her actions. Other employees were disciplined for similar conduct including attendance issues. Other employees' work was supervised, and other employees were given the duties of floor care. Thus, the General Counsel failed to establish a prima facia case of discrimination regarding Vazquez as alleged in complaint paragraphs 7(a)(10), 7(b)(10) and (11), 7(c)(5) and (7), 7(d)(3) and (4),

4. Complaint pars. 7(a)(12), 7(b)(12), (14) through (17), 7(c)(4), 7(d)(1) and (2), and 7(h)(1): Tanisha Martinez Ruiz

Tanisha Martinez Ruiz (Ruiz) worked as an EVS attendant II on the dayshift in area 1 for Respondent for approximately 4 years prior to being terminated on January 9, 2019 (Tr. 913, 915, 951, 1688). Ruiz supported the Union by wearing her button to work, and assisted

employees as a witness a couple times per month in meetings with McKinnon and Blake (Tr. 917). Ruiz also went with other employees to the NLRB office between the last week of December 2018 and mid-January 2019. Finally, after she was terminated, Ruiz submitted a statement in support of Vazquez' January 2019 complaint against McKinnon. Ruiz testified that McKinnon commented in June 2018 that he could tell she stood strong with the Union because she wore her button (Tr. 917–918). Millet also admits Ruiz was a union member (Tr. 120, 920).

April 30, 2018: Preventative Counseling[64]

On April 23, 2018, only a few days after McKinnon and Blake began working at Respondent, Ruiz testified that McKinnon scheduled a training on the use of the ultraviolet machine used to disinfect a patient room. Ruiz testified that the room for the training was crowded so she stood outside the door along with approximately 10 other employees (Tr. 925). McKinnon told Ruiz to go inside the room, but she said she was as close as she could be to the inside. Ruiz testified that McKinnon did not say anything else to her at the time. In contrast, McKinnon testified that he asked Ruiz to step into the room for the training, and Ruiz refused (Tr. 1506). McKinnon testified that as he tried to talk to Ruiz to enter the room for the training, Ruiz repeated that she would not go into the room and ultimately walked away from McKinnon as he was speaking to her (Tr. 1393, 1506–1507, 1622–1623). Blake was present during this incident. McKinnon testified that the room for the training was selected for the purpose of being able to hold the number of employees attending the training (Tr. 1393, 1504–1505). Thereafter, McKinnon asked Blake to tell Ruiz to come to the EVS office (Tr. 1663). In the EVS office, McKinnon and Blake spoke to Ruiz about her attitude and need to act professionally (Tr. 1624). Then on April 30, 2018, Blake issued Ruiz a level 1 preventative counseling for insubordinate and rude and discourteous behavior for the April 23, 2018 incident (GC Exh. 3; Tr. 924, 961).

November 9, 2018: Preventative Counseling

On November 9, 2018, Blake issued Ruiz a preventative counseling for attendance (GC Exh. 3). Ruiz told Blake that she had FMLA leave, but Blake said she had not used her FMLA correctly. Ruiz testified that she did not have any rules as to when she needed to call in to the facility to use her FMLA leave but she also admitted that with intermittent FMLA leave, employees needed to call in at least 4 hours prior to the start of their shift to use the leave (Tr. 962). Ruiz conceded that the 7 points she accrued could result in a preventive counseling as permitted by the expired CBA (Tr. 963).

November 10, 2018: Verbal Warning

On November 10, 2018, Blake and McKinnon gave Ruiz a verbal warning when she took her lunch break out of schedule (Tr. 928). Ruiz testified that she took her lunch later than scheduled due to a discharge room the nurses asked her to clean (Tr. 930). Ruiz did not use her radio to inform a manager that she needed to take a later lunch break but testified that sometimes

[64] Ruiz testified that she received this preventative counseling in September 2018, did not recall signing it, and could not verify the document's accuracy (Tr. 959). I do not credit Ruiz' testimony that she received this document in September 2018. The signature line indicates that Ruiz signed the document on April 30, 2018. Ruiz did not claim that this was not her signature or handwriting. Furthermore, her signature on other documents which she does not dispute receiving or signing have similar signatures.

the radio did not work (Tr. 964–965). Ruiz testified that she informed the lead EVS attendant Valles that she would be taking her break later due to the discharge room to clean (Tr. 965).

November 23, 2018: Increased Work Assignments

On November 23, 2018, Blake and Millet issued Ruiz a preventative counseling for an incident on November 21, 2018, due to Ruiz refusing Millet's instructions to clean an area as well as for rude and discourteous behavior (GC Exh. 3). Ruiz testified that Millet could not find her while she was cleaning a bathroom flooded with water. When Ruiz came out from the bathroom, she was cleaning, Millet began yelling at her about a spill in the main lobby. Ruiz responded and tried to show Millet a log of her work. However, Millet "yanked" the paper from her hand and walked away (Tr. 931–932). On cross-examination, Ruiz denied knowing whether Millet tried to call her, but claimed that she called lead EVS attendant Wong (Tr. 968). Wong could not corroborate Ruiz' testimony as she could not recall this incident (Tr. 1117–1118).

December 3, 2018: Preventative Counseling and Disparate Administration of FMLA

On December 3, 2018, Blake issued Ruiz a preventative counseling for attendance as well as for tardiness and early clock out from her work shift (GC Exh. 3). Ruiz testified that she had been approved for intermittent FMLA leave during this time (Tr. 934). The record contains no evidence of this FMLA approval.

December 4, 2018: Written Warning and Closer Supervision

On December 3, 2018, Chief Operating Officer Silver called the EVS department to report a strong odor from the main lobby restroom (Tr. 1694–1695, 1728–1729). Ruiz was responsible for cleaning the main lobby restroom, which is part of area 1, Monday through Friday on the dayshift. Millet testified that Blake and he observed heavy build up in the men's urinals and heavy dust; Millet took photos which McKinnon later annotated (Tr. 1397–1398, 1695). Millet testified that they asked Ruiz if she had cleaned the restroom, which she said she had (Tr. 1695–1696).[65] Then they showed her the build-up in the urinals and the dust. Thereafter, Millet, Blake, and Ruiz went into the EVS office where McKinnon was present to discuss proper cleaning procedures and sanitation (Tr. 1696–1697). Ruiz testified that Millet and Blake yelled at her, and they would not allow her to speak so she could explain that she reported these problems to Rubio earlier during her shift (Tr. 936–937). Porchia was present at this meeting as a witness, but she did not testify about this incident (Tr. 1698). Rubio also did not testify about this incident.

On December 4, 2018, Blake and Millet issued a written warning to Ruiz for violating performance standards on December 3, 2018. Respondent offered Ruiz re-training (GC Exh. 3).

[65] Millet's contemporaneous notes are generally consistent with his testimony (R. Exh. 26; Tr. 1697). Millet testified that if Ruiz had been at work in the prior 2 to 3 days, she would have noticed the build–up. Millet also testified that he did not check the assignment log to see if she had finished cleaning the restroom since they received a complaint (Tr. 1733).

December 31, 2018: Suspension and Disparate Administration of FMLA[66]

On December 31, 2018, McKinnon placed Ruiz on suspension pending investigation due to misuse of FMLA when she left early the prior day (GC Exh. 3; Tr. 939). Before this meeting, Ruiz asked for a union representative, but McKinnon denied her request, stating that Smith had left for the day and employees are not allowed to remain at the facility after clocking out (Tr. 939). Ruiz' suspension lasted for 3 days (Tr. 940).

January 4, 2019: Suspension

On January 4, 2019, Millet and McKinnon placed Ruiz on suspension pending investigation (GC Exh. 3; Tr. 1691).[67] On the suspension notice, Ruiz wrote, "Darrell Millet asked me to remove my water bottle from the cart. I asked if I can plz get that in writing that I'm allowed to walk off my station to drink water. Water is not available to us in an open area" (GC Exh. 3). A few days prior, on December 31, 2018, during the daily huddle, Blake reminded the employees that no personal items should be on their carts including food and drink (R. Exh. 37). Furthermore, the rule that prohibits personal items on the cart is posted in the enclosed bulletin board by the EVS office (Tr. 1408, Jt. Exh. 2; R. Exh. 36).

Millet testified that he was rounding at the facility when he found a water bottle on Ruiz' cart (Tr. 1689).[68] Millet told Ruiz to remove her water bottle from the cart and explained that a water bottle in the cart goes against policy (Tr. 128). Millet testified that Ruiz refused to remove her water bottle because she was thirsty and wanted Millet to put in writing that she could leave her station to get water (Tr. 941–942, 1689–1688). Millet testified that he told Ruiz that if she refused to move the water bottle, she would be considered insubordinate and pending investigation, terminated (Tr. 1690). When Ruiz refused again, Millet contacted McKinnon (Tr. 1690). Millet testified that after McKinnon and Blake approached them, McKinnon asked Ruiz if she was refusing to remove her water bottle which she said she was. McKinnon reiterated Millet's warning. McKinnon again explained that the water bottle on her cart violated federal and state health and safety rules as well as Respondent's rules (Tr. 1400; Jt. Exh. 2). McKinnon

[66] The complaint alleges the suspension occurred in 2019, but the evidence shows that the suspension occurred in 2018 (See GC Br. at 168 fn. 54).

[67] Other employees were also disciplined for placing their water bottle in their cart (R. Exh. 99, 101, 110). CGC finds "suspicious" that Respondent did not provide photos of the water bottle on Ruiz' cart unlike similar disciplinary actions (GC Br. at 77 fn. 28). I do not find this distinction to support a finding of circumstantial evidence of discriminatory motive as Ruiz never claimed she did not store her personal water bottle on the cart, either in the closed compartment or out in the open.

[68] The testimony of all the witnesses differs as to whether the water bottle was found in a compartment in the cart or placed on top of the cart. Millet testified that he vaguely recalled this incident but testified that he found the water bottle in a compartment of her cart after he inspected the cart as he routinely does (Tr. 129, 1723–1724). Millet's contemporaneous notes state that he noticed the water bottle on her cart (R. Exh. 34). Ruiz testified that Blake moved her water bottle from outside her cart to inside her cart and then took a photo of the water bottle (Tr. 942). Ruiz also testified that her Union button fell off, and Blake picked it up and gave it back to her, making "a gesture like, you know, good thing you stand strong with the Union" (Tr. 943). Ruiz responded, "excuse me?" Blake said, "you're a union member" (Tr. 943). I do not credit Ruiz' testimony. Millet testified that he did recall Ruiz' Union button falling off (Tr. 127–128). I credit Millet's testimony, in part, but rely on his contemporaneous notes. Furthermore, Ruiz' testimony that Blake made the comments about the Union is unlikely to have occurred as such a comment does not make logical sense considering the context of their discussion. Ruiz never denied having the water bottle on the cart.

and Millet documented contemporaneously his conversation with Ruiz on January 4, 2019 (R. Exh. 32, 34; Tr. 1403). McKinnon took photos of the rule posted in the enclosed bulletin board to include in the "package" to support the termination of Ruiz (Tr. 1410–1412).

January 9, 2019: Termination

On January 9, 2019, Respondent asked Ruiz to return to work to attend a meeting (Tr. 945, 1403–1404). At this meeting, Irwin, Blake, and McKinnon attended on behalf of Respondent while Sedasia Griffin (Griffin) served as Ruiz' chosen representative (Tr. 944–945). At this meeting, McKinnon provided Ruiz a final written warning dated January 7, 2019, for failing to inform management at least 4 hours prior to her shift if she would be late or absent (GC Exh. 3). Ruiz testified that she had informed Rubio and Blake that she would be not be coming to work that day (GC Exh. 3). Then, McKinnon provided Ruiz with a level 4 termination notice for insubordination for her actions on January 4, 2019 (GC Exh. 3; Tr. 402).[69]

*Credibility*

I cannot credit Ruiz' testimony. As for the April 30, 2018 incident, Ruiz' version of events where McKinnon does not respond to Ruiz' refusal to enter the room for training makes little sense. Blake, who witnessed this event, credibly testified that Ruiz refused a direct order from McKinnon and walked away from him. As for the FMLA incidents, the record contains no evidence that Ruiz' ability to call in less than 4 hours prior to shift was permitted. Furthermore, Millet's contemporaneous notes support his testimony as to what occurred on December 3, 2018, and Porchia did not testify about the subsequent meeting. Finally, as set forth above, Ruiz cannot be credited for her testimony about the events on January 4, 2019. Overall, I did not find Ruiz to be a credible witness. Her testimony was uncorroborated, and she does not refute many of the allegations against her regarding her performance and her attendance issues.

*Legal Analysis*

In complaint paragraphs 7(a)(12), 7(b)(12), (14) through (17), 7(c)(4), 7(d)(1) and (2), and 7(h)(1), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) when the EVS director and managers closely supervised Ruiz on December 4, 2018; disciplined her in September 2018, November 9 and 10, 2018, and December 3 and 4, 2018; increased her work assignments on November 23, 2018; disparately administering FMLA leave on December 3 and 31, 2018; suspended her on December 31, 2018 and January 4, 2019; and terminated her on January 9, 2019. CGC argues that Respondent had animus towards Ruiz for her "avid support and activity with the Union" (GC Br. at 165). CGC then argues that any discipline given to Ruiz was pretextual (GC Br. at 166–170). Counsel for Respondent argues that Ruiz did not engage in protected concerted activity, Respondent was not aware of any activity, assuming it existed, and Respondent terminated Ruiz for legitimate reasons (R. Br. at 12–13).

Ruiz engaged in union activity due to her participation in representing employees during meetings and wearing a union button to work. Millet testified that he was aware of her union activity. The record also indicates that McKinnon most likely knew of Ruiz' union activity. Ruiz

[69] Art. 7.01 of the expired CBA provides that employees may be discharged without prior discipline for insubordination.

also went to the NLRB office with other employees but the record contains no evidence that Respondent became aware of their visit.

Next, I will evaluate the General Counsel's theory that animus towards Ruiz' protected concerted union activity was a substantial or motivating factor in Respondent's treatment of Ruiz. Throughout this entire time from April 2018 until her termination on January 9, 2019, Ruiz did not engage in any Section 7 activity other than wearing a union button and possibly represent employees during disciplinary meetings (although the record lacks any specific instances of meetings during this time). Thus, I cannot find any causal connection between Ruiz Section 7 activity and the disciplinary actions issued to her. From the start, the General Counsel has failed to prove their case regarding Ruiz. CGC makes general assertions of Ruiz' Section 7 activity, then explains disciplinary actions she received, and then says that Respondent was motivated by her Section 7 activity without any persuasion.

Ruiz' was initially disciplined only a short time after McKinnon began working at Respondent. At this point, McKinnon may have known of her union support, but the motivation for the disciplinary action cannot be connected to her union activity. The credited evidence demonstrates that Ruiz failed to follow instructions. Seven months later, Respondent disciplined Ruiz again for attendance issues as well as her conduct. Respondent's assignment of additional areas to clean on November 23, 2018, is consistent with Respondent's practice during this time of having employees clean areas other than those assigned when the need arose. Ruiz then faced several attendance disciplinary actions, but the record contains no evidence about her FMLA approval or any rules in which she was exempt. Ruiz also claimed to have informed the lead employee and Rubio about areas she was cleaning that had problems, but Porchia, who attended one of the disciplinary meetings, did not testify about these incidents. The final disciplinary action came when again, Ruiz did not follow the leave procedures when she left early for the day and for having a water bottle on her cart, when she had recently been reminded during a huddle, that personal items could not be on the carts. Ruiz does not deny the water bottle was on her cart, and whether the bottle was in her cart or out in the open is irrelevant. Respondent's actions to suspend and discipline Ruiz on various occasions cannot be shown to have been motivated by her Section 7 activity, which was not readily apparent from this record. As I stated earlier, I do not credit Ruiz' testimony that Blake or McKinnon made comments about her union support. Thus, the General Counsel failed to establish a prima facia case of discrimination regarding Ruiz as alleged in complaint paragraphs 7(a)(12), 7(b)(12), (14) through (17), 7(c)(4), 7(d)(1) and (2), and 7(h)(1).

5. Complaint pars. 7(a)(11), and 7(b)(1) through (3): Chris Flood

Flood, who is a current EVS attendant on the swing shift and has been employed by Respondent for the past 15 years, is a union member, wears her union button, and participates in passing out handbills (Tr. 879).[70] Millet and Cox admitted that they knew Flood is a union member who wears her union buttons (Tr. 119–120, 389–390). Prior to January 2019, Flood had never received any disciplinary actions. Furthermore, Flood's performance reviews did not

[70] Flood filed a grievance on January 26, 2018, concerning leave issues (GC Exh. 17). CGC, in its brief, argues that only three days later Flood was disciplined (GC Br. at 181). However, the grievance was filed *1 year* earlier than any disciplinary action was issued to Flood, and before McKinnon and the EVS managers were employed by Respondent.

indicate any issues; the last performance review conducted was in summer 2018 (GC Exh. 63; Tr. 895–896).

January 19, 2019: Preventative Counseling[71]

On January 29, 2019, Flood received a preventative counseling from Millet for performance deficiencies on January 28, 2019, and for rude and sarcastic behavior about a co-worker on January 29, 2019 (GC Exh. 62). Flood denied the remarks attributed to her in the January 29, 2019 allegation (Tr. 886–887). A couple days later Flood spoke with McKinnon about the disciplinary action, in the presence of Judge as her representative as well as Millet, Cox, and Blake (Tr. 888). Despite Flood's request that McKinnon speak to another employee about the alleged rude and sarcastic comment, McKinnon told her that the discipline stands (Tr. 889).

February 6, 2019: Written Warning[72]

On February 6, 2019, Flood received a written warning from Cox regarding performance deficiencies in her area (GC Exh. 16).

February 13, 2019: Closer Supervision and Final Written Warning

On February 13, 2019, Flood received a final written warning from Cox for performance deficiencies again in her area (GC Exh. 16). McKinnon testified that the managers and he had been receiving complaints from the department directors that the cath lab was not being cleaned properly. Thus, they started inspecting this area (Tr. 1417). During this meeting, in the presence of Millet, Blake, and McKinnon, Flood asked to be shown where her performance deficiencies were. Blake walked her to her area and showed her the performance deficiencies (Tr. 892). McKinnon testified that Blake and he took photos of the deficiencies, and he created a document with the photos and descriptions to support the disciplinary action (R. Exh. 64 and 67; Tr. 1414–1418). During this final written warning meeting, McKinnon asked Flood if she would like retraining which she accepted (Tr. 892). However, no retraining was conducted.

*Credibility*

As stated previously, I find Flood to be a credible witness. Flood testified consistently with other employees. Flood, who is a current employee, also testified against her economic interests which also bolsters her credibility.

*Legal Analysis*

In complaint paragraphs 7(a)(11), and 7(b)(1) through (3), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) when the EVS director and managers closely supervised Flood in February 2019; and disciplined her on January 19, 2019, and February 6 and

[71] CGC, in its brief, states that the complaint erroneously states that the discipline was issued on January 19, 2019 (GC Br. at 181 fn. 60).

[72] CGC, in its brief, states that the complaint erroneously states that the discipline was issued "sometime in January 2019" (GC Br at 182 fn. 62).

13, 2019. CGC argues that Respondent had Flood engaged in union activity, and Respondent had animus towards her support of the Union as well as Respondent's general animus (GC Br. at 181–182). Counsel for Respondent argues that the General Counsel failed to discredit Respondent's evidence substantiating the disciplinary actions (R. Br. at 20–21).

Flood engaged in union activity due to her union membership, wearing of a union button to work and passing out hand bills. Millet testified that he was aware of her union membership.

Next, I will evaluate the General Counsel's theory that animus towards Flood's union activity was a substantial or motivating factor in Respondent's treatment of Flood. Here is another employee where the connection between Section 7 activity and the adverse employment action is missing. Flood obviously was another active union supporter which was known to management. None of the actions issued to her can be connected to her Section 7 activity. Flood denied making a rude comment to her coworker, but McKinnon disagreed and issued her a preventative counseling. Thereafter, due to complaints received from other components in the facility, Flood was disciplined for her performance. As stated previously, McKinnon and the EVS managers actively inspected the employees' work daily, and there is no evidence that they targeted any one employee. It is reasonable to assume that they would inspect an employee's area even more if they received complaints. The General Counsel argues that McKinnon was motivated by the grievance filed by Flood, but this grievance was filed in 2018, not 2019 when she was disciplined. The General Counsel had failed to sustain their burden of proof, and complaint paragraphs 7(a)(11), and 7(b)(1) through (3) are dismissed.

6. Complaint pars. 7(a)(13) and (14), 7(b)(19) and (20), 7(f), 7(g), and 7(h)(3): Sherrill Smith

Smith worked for Respondent for over 20 years before she was discharged on February 3, 2019 (Tr. 618). Prior to her termination, since June 2018, Smith worked as a utility attendant on the graveyard shift from 11 p.m. to 7:30 a.m., and before that time, she worked as a linen attendant for 8 to 10 years. As a utility attendant, Smith cleaned the radiology department, assisted with discharge cleanings, and assisted with floor care, which includes stripping, waxing, scrubbing, mopping, and sweeping, in the emergency department (Tr. 673). Smith wore two union buttons which indicated her support for the Union and that she was a shop steward (Tr. 622).[73] Smith testified that other than attendance disciplinary actions she had not received any performance disciplinary actions until late 2018 (Tr. 657).

November 7, 2018: Preventative Counseling

On November 7, 2018, Rubio issued Smith a preventative counseling for sitting in a patient room rather than cleaning as reported to the EVS department by a nurse supervisor (GC Exh. 10; Tr. 633–634, 1379, 1504). Smith commented on the disciplinary form that she had turned on the ultraviolet (UV) light function to disinfect a restroom and was waiting for it to be

[73] On August 19, 2018, Rubio issued a written warning to Smith for failure to follow the attendance policy (GC Exh. 10). On October 10, 2018, Rubio issued a final written warning to smith for failing to follow the sick leave policy (GC Exh. 10).

completed. She also commented that she felt that she was being harassed "not by my manager but by others in the hospital" (GC Exh. 10).

Smith testified that the UV light function takes approximately 45 minutes depending on the room size, but McKinnon testified that it should take only 15 minutes on average (Tr. 1450). Smith also testified that she had performed the UV light function at least 20 times prior, would sit in a chair in the hallway to wait for the disinfection to be completed, and had never been disciplined (Tr. 634–635). McKinnon testified that employees should continue working in the area cleaning while the UV light function takes place (Tr. 1320–1321, 1453).

December 17, 2018: Restricting Access to the Facility During Nonwork Hours, and December 18, 2018: Closer Supervision

On December 16, 2018, Smith went to the basement during the 7 a.m. morning huddle for the dayshift employees to inform the managers that a nurse requested a housekeeper by 9 a.m. (Tr. 638–639). Smith testified that she waited outside the room where the huddle was taking place (Tr. 646). Smith testified that the nurse told her that the managers would not answer their phones or the radio (Tr. 639).

On December 17, 2018, as discussed earlier, McKinnon refused to allow Smith to attend a meeting he was having with Vazquez. After McKinnon refused to permit Smith to attend the meeting, she waited in the hallway (Tr. 637). McKinnon stepped out of his office, asking Smith what she was doing. After Smith explained that she was waiting for Vazquez, McKinnon reminded Smith that she had come down to the basement early the day before and that she should not come to the basement until after 7:15 a.m. (Tr. 638, 640). Smith testified that McKinnon told her in April 2018 she could not attend the huddles of shifts other than her own (Tr. 644–645). Smith explained that she had attended the huddles previously to be aware of rules that were being put in place as well as discussions of work (Tr. 645).

On December 18, 2018, Rubio and Blake issued Smith a written warning for the December 16, 2018 incident.[74] The disciplinary action stated that Smith had left her duty station early three times during the past 7 days and had been directed by the managers on the second occasion to remain in her station until her shift had ended (GC Exh. 10). Smith commented on the disciplinary action, "I was ask[ed] by the nurse in the [operating room] to give the manager a message. I came to the basement. They were in the huddle. I stood outside the door, waited for the meeting to finish, gave Darrell the message and went back upstairs. I feel this is harassment" (GC Exh. 10). Millet testified that Smith, on several occasions, would leave her duty station to attend the 7 a.m. dayshift huddle instead of remaining at her station until 7:30 a.m. (Tr. 1711).

January 8, 2019: Final Written Warning, Closer Supervision and Restricting Access to the Facility During Work Hours

On January 8, 2019, Smith received a final written warning from Rubio. This disciplinary action stated, "On Tuesday January 8, 2019 at approximately 6:30am hours I was walking the Emergency department and observed you inside the secured admitting work area of

[74] This written warning issued to Smith is not alleged as a violation of the Act.

employees. You were observed using company property (Copy Machine) belonging to the Admitting Department while you should have been cleaning rooms. This was not an assigned work area and you are not authorized to use other department equipment for your needs without permission of your manager" (GC Exh. 10; Tr. 647–648, 1382). McKinnon, who observed the incident, decided to discipline Smith due to her history of leaving her workstation without permission (Tr. 1383).

Smith testified that she needed to make a copy of her request for time off for CBA negotiations. Smith asked Porchia, who was at work early to have coffee with another employee, if she could ask the nurse if she could make copies of her request for time off. The nurse agreed, and Porchia unlocked the door to the copy machine, and they made the copies (Tr. 1000). Smith testified that she looked up and saw McKinnon, Blake, Rubio, and Millet watching her. Porchia testified similarly (Tr. 1000). McKinnon motioned for her to come out of the copy room. After a minute, Smith finished copying and Rubio told her to go to her station. Smith asked Rubio to take her leave slips to the EVS office (Tr. 650–652).

Porchia, who works on the day shift, testified that after the morning huddle, McKinnon asked to speak with her (Tr. 1002). McKinnon told Porchia he did not want the employees to be "going to the back of the house anymore" (Tr. 1002). Porchia testified that she had never heard that term before but thought that McKinnon seemed to be referring the admitting area where she had been. McKinnon told her that if she comes in early, she should go straight to the cafeteria (Tr. 1002). McKinnon then asked Porchia what Smith was doing. Porchia replied that Smith was making copies of her vacation slip. McKinnon asked if Porchia was certain, and Porchia replied that the vacation slips are what she saw. McKinnon asked Porchia to find out what Smith was doing at the machine and told her he would not discipline her for that morning (Tr. 1002). McKinnon told Porchia he did not want her in that area again, but that Smith would be disciplined for being off her station, to which Porchia did not agree.

After receiving the discipline, Smith went to Thorne to explain what was happening. Thorne asked to set up a meeting with Smith, McKinnon, and herself to work things out. Smith agreed and went home (Tr. 653). The following day, January 9, 2019, the meeting occurred in Thorne's office. Smith started the meeting by asking Thorne if she could come into the facility earlier than 10 minutes prior to her shift due to her bus schedule. McKinnon told Thorne that Smith could not "go to the back of the house." Smith explained that she will sometimes get coffee at the nurse's stations and then go to the break room or cafeteria. McKinnon reiterated that Smith could not "go to the back of the house." Smith testified that McKinnon told her in approximately June 2018 that "back of the house" was anywhere in the facility aside from the cafeteria (Tr. 680, 689). Prior to June 2018, Smith had no limitation on where she could go in the facility and during what times she could be at the facility (Tr. 690). Smith then told Thorne that due to McKinnon's "two personalities" that she would withdraw from the Union and all activities if she could keep her job (Tr. 654, 656). Smith told Thorne that she predicted she would be terminated before negotiations.

<u>February 3, 2019: Level 4 Termination</u>

On the night of January 19, 2019, Smith testified that she was ill and informed Rubio but stayed at work because no other employees could take her place. Later Cox testified that on

January 20, 2019, when he came into work at 7 a.m. as the dayshift supervisor, he received a patient complaint from the floor manager because a discharge room had not been cleaned properly (Tr. 1792, 1811–1812). Cox went to speak to the patient and promised to correct the deficiencies in the room (Tr. 1803–1804). Cox then investigated who cleaned the room and learned that it was Smith based on the daily assignment sheet (Tr. 1792–1793; R. Exh. 53). Cox took photos of the deficiencies in the room which included duty vents, dust on the lights, drips of fluid on the side of the bed and a sticker on the floor (Tr. 1793–1794). Cox explained that he took photos with Respondent's manager phone and then emailed the photos to his work email (Tr. 1805). Thereafter, he put the photos in a power point document and labeled the photos; McKinnon also added text to the photos based on the nurse manager's inspection and communication with patient and family (Tr. 1384–1388, 1800–1801; R. Exh. 52). Cox's contemporaneous notes confirm his testimony (R. Exh. 51). Cox then went to speak to McKinnon (Tr. 1804). Cox did not speak to Smith about the complaint (Tr. 1806–1807). Cox also testified that Rubio did not share any information that Smith was ill that night (Tr. 1807, 1809).[75]

Thorne testified that she was not involved in the termination of Smith (Tr. 149). However, Irwin and McKinnon spoke to Thorne about terminating Smith (Tr. 155–156). On January 21, 2019, Thorne emailed Cassard, informing him that Smith is on level 3 discipline for attendance and performance, and she had recently called in absent and had an unclean room. Thorne flagged for Cassard that Smith is the shop steward as the parties were headed into 2 days of negotiations. Thorne asked Cassard if he approved them proceeding with the termination. Cassard approved moving forward with Smith's termination. However, on January 28, 2019, Thorne emailed Cassard to inform him that due to Smith being approved for FMLA leave, her attendance no longer was at issue, but Respondent still sought to remove her for performance when she returned from FMLA leave (GC Exh. 12; Tr. 157–158). Thorne testified that Smith being a union shop steward had no bearing on her termination but that she mentioned this fact to Cassard due to negotiations for a new CBA (Tr. 158).

On February 3, 2019, Rubio asked Smith to talk to McKinnon in the EVS office (Tr. 661). Smith went to the EVS office where McKinnon, Blake, Millet, Rubio, and Cox along with employee Antonio Jackson (Jackson) were waiting for her (Tr. 661, 1390). Smith testified that it was unusual for all the managers to be there as it was Super Bowl Sunday (Tr. 663). Smith was then terminated for the January 20, 2019 unclean discharge room (GC Exh. 10; Tr. 665–666, 1388). McKinnon's February 4, 2019 notes indicate that Smith agreed to Jackson acting as her witness, and that she did not tell Rubio she could not work to performance standards (R. Exh. 49; Tr. 1389).

*Credibility*

Smith provided somewhat confusing testimony wherein she recalled some events consistently with other witnesses but at other times could not recall similar facts. However, overall, I credit her testimony as to the events that took place. Regarding the January 8, 2019 incident, Porchia's testimony corroborated Smith's testimony. Smith does not deny that these incidents took place. Thus, I credit Smith and Porchia's testimony.

[75] Rubio did not testify and no longer works for Respondent (Tr. 1814).

*Legal Analysis*

In complaint paragraphs 7(a)(13) and (14), 7(b)(19) and (20), 7(f), 7(g), and 7(h)(3), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) when the EVS director and managers closely supervised Smith in December 2018 and January 2019; disciplined her in November 2018 and on January 8, 2019; restricted her access to the facility during non-work hours on December 17, 2018, and during work hours on January 8, 2019; and terminated her on February 3, 2019. CGC argues that Respondent knew Smith engaged in union activity, Respondent had animus towards her union activity, and the disciplinary actions were pretextual (GC Br. at 162–165). Counsel for Respondent argues that the General Counsel failed to discredit Respondent's evidence substantiating the disciplinary actions (R. Br. at 18).

Smith engaged in union activity due to her role as the shop steward and participation on the negotiating committee. Significantly, on November 12, 2018, McKinnon violated Section 8(a)(1) of the Act when he told Smith to "shut up" during Pietanza's grievance meeting. Smith also advocated on behalf of the various employees in mid-December 2018, filed a UHS complaint in late December 2018 and went to the NLRB office in late December 2018 or January 2019 to complain about McKinnon (although the record lack evidence that Respondent was aware of the NLRB visit). In totality, the record is clear that McKinnon and the EVS managers knew of Smith's protected concerted union activity.

Next, I will evaluate the General Counsel's theory that animus towards Smith's protected concerted union activity was a substantial or motivating factor in Respondent's treatment of Smith. In contrast to all the other employees alleged as discriminatees in this matter, I find that the General Counsel has proven that Smith's union activity was a motivating factor in the adverse actions issued to her after November 12, 2018. Circumstantial evidence of discriminatory motivation includes suspicious timing. In this instance, the confrontation between McKinnon and Smith began on November 12, 2018, when McKinnon told Smith to sit down and shut up during a grievance meeting involving Pietanza. The credited evidence also shows that McKinnon told Smith he could terminate her if he chose. As discussed above, I found this incident to be a violation of Section 8(a)(1) of the Act. Evidence of independent Section 8(a)(1) violations may indicate animus. I find so here where the subject of the violation was Smith in her actions as a union representative for Pietanza. McKinnon immediately complained about Smith's conduct as a union representative, which he found inappropriate, to Irwin and Thorne. Thereafter, when Smith tried to represent Vazquez during a December 13, 2018 meeting, McKinnon unlawfully refused Vazquez Smith's representation—again another violation of Section 8(a)(1) of the Act.

As referenced above, McKinnon's animus towards Smith's union activity is evident during the November 12, 2018 meeting with Pietanza. But I do not find any evidence of animus towards Smith's union activity prior to November 12, 2018. The November 7, 2018 preventative counseling Respondent issued to Smith came about due to a nurse supervisor complained to McKinnon about Smith's action of sitting in the patient room. The General Counsel has failed to prove that Smith's November 7, 2018 preventive counseling was motivated by animus. Thus, this complaint paragraph 7(b)(19) is dismissed.

However, Respondent unlawfully subjected her to closer supervision on about December 18, 2018. After Smith attempted to represent Vazquez during a meeting on December 13, 2018, Respondent disciplined Smith for three occasions in which she "reported to the dayshift huddle." Smith's credible testimony indicates that she sought only to communicate with the managers due to at least one request by a nurse, and another occasion likely was her attempt to represent Vazquez. McKinnon, Rubio, and Blake clearly did not want Smith to be present during these morning huddles despite her attempts to both represent an employee and communicate work-related information. Respondent's reaction to Smith's appearance in the EVS basement appears to be motivated, in part, by her union activity to represent employees individually or collectively, despite her testimony that she was not acting in this capacity.

I do not, however, find that Respondent discriminatorily restricted Smith's access to the facility on December 17, 2018, during nonwork hours as the evidence shows that she left her assigned station area to go to the basement while she was on duty. Furthermore, CGC makes no argument in support of this allegation in its brief. Thus, complaint paragraph 7(f) is dismissed.

But Respondent's level final written warning issued to Smith on January 8, 2019, appears to be pretextual. On that date, Respondent alleged that Smith did not remain in her assigned work area. However, Porchia credibly testified that Smith was in her assigned work area and that the admitting area is part of the emergency department. Furthermore, McKinnon did not appear to ask Smith any questions about what she was doing, but instead asked Porchia to tell him what Smith was doing. McKinnon's questioning of Porchia, and not Smith, hints of discriminatory animus as he sought to supervise her closely during this period. Furthermore, Rubio issued the discipline to Smith and did not discuss it with her. Due to the timing of events as well as the prior 8(a)(1) violations I have found, Respondent's final written warning and closer supervision of Smith on January 8, 2019, is pretextual, a presumption Respondent cannot rebut nor has Respondent attempted to do so in its brief.

CGC also has failed to present evidence or argument that Respondent discriminatorily restricted Smith's access to the facility during work hours as alleged at complaint paragraph 7(g). Thus, this complaint paragraph is dismissed.

Finally, circumstantial evidence shows that Respondent terminated Smith discriminatorily on February 3, 2019. On January 19, 2019, Smith continued to work despite not feeling well and informing Rubio of her ill health; Rubio did not require her to leave work due to her illness. Cox received a complaint the following morning about an unclean room and investigated the matter. Cox testified that he did not ask Smith any questions and Rubio did not share that Smith was ill that night. As compared to Pietanza, on Smith's first infraction of poor performance for room cleaning, Respondent decided to remove her rather than offer her training or a lesser disciplinary action. Such a swift action to remove her indicates animus for her union activity. Respondent provided no arguments that even without the union activity, Smith would still be terminated. Reviewing the disciplinary actions in this matter as comparator, Smith was treated more harshly than the others where I have found animus for Section 7 activity to be nonexistent. Thus, I find that Respondent violated Section 8(a)(3) and (1) when terminating Smith on February 3, 2019, as well as issuing her a final written warning on January 8, 2019, and closely supervising her on December 18, 2018, and January 8, 2019. The other allegations are dismissed.

7. Complaint pars. 7(b)(18), 7(e)(3), and 7(h)(2): Tami Sambrano

Tami Sambrano (Sambrano) worked for Respondent as a dietary clerk in the dietary department from August 2014 to January 28, 2019 when she was terminated; her work hours were from 5 a.m. to 1:30 p.m. (Tr. 699). Weding was Sambrano's supervisor. As a dietary clerk, Sambrano would open the office, run a census of all current patients, print labels for the floors, have menus ready, set up the tray line, take surveys, and help patients select meals (Tr. 699). Sambrano explained that after a patient is admitted to the facility, a registered dietician and doctor will prescribe a diet for the patient. Sambrano then would label the menu with the patient's specifications (Tr. 701).

Sambrano was an active union supporter who would wear her union button and attend union meetings (Tr. 702). In the summer of 2018, due to concerns about scheduling and additional duties, Sambrano along with coworkers Marlene Hall (Hall), Brandi (last name unknown), and June Edwards (Edwards) filed a grievance (Tr. 706–707). After the grievance was filed, approximately 5 to 15 dietary employees attended a 45-minute meeting with Cardoza, Irwin, Weding, Chapfield, and Pike (Tr. 259, 407, 708, 750). Sambrano testified that she spoke at this meeting, pointing out that scheduling did not follow the expired CBA. Sambrano testified that she assisted other employees when they needed help with scheduling by giving them advice on the expired CBA and filing grievances (Tr. 332). Sambrano testified that Cardoza and Weding would make comments that the employees make more money due to the Union and they should not be complaining (Tr. 711).

<u>January 8, 2019: Final Written Warning</u>

On January 2, 2019, Sambrano arrived at work and learned her computer was not working. Without the use of her computer, she could not assist patients with their meals. Thus, after not being able to reach Weding or her coworkers, she called the information technology (IT) help desk for assistance. Sambrano repeatedly called the IT help desk for assistance but could not reach anyone (Tr. 730, 1753). She testified that when she was finally able to reach the IT employee, he was "really snippy and upset" that she had continuously called instead of leaving messages and waiting for him to call back (Tr. 730). Sambrano denied screaming and yelling at the IT employee, only that she was upset and stressed about being 30 minutes behind work (Tr. 730). In contrast to Sambrano's testimony, the IT help desk employee complained in an email that Sambrano acted in a rude and discourteous manner and was yelling (Tr. 1753–1754; R. Exh. 57). Gregg, Weding's supervisor, forwarded the email to Weding, stating, "Please follow up on this I am growing tired of hearing this name" (R. Exh. 57).

On January 8, 2019, Weding issued Sambrano a final written warning for allegedly being rude and disrespectful to the IT computer help desk employee on January 2, 2019 (GC Exh. 20). Sambrano submitted a statement to Weding after she was disciplined explaining what had happened that morning; in this statement Sambrano stated that the IT employee was not accommodating and was rude about the situation (GC Exh. 48; Tr. 731–734). Weding could not explain why discipline was issued to Sambrano even though she claimed that the IT help desk

employee was rude to her (Tr. 1782). Weding testified that he assumed Gregg spoke to the IT help desk employee and investigated the complaint about Sambrano (Tr. 1781–1782).[76]

Prior to the level 3 final written warning, Sambrano had received a written counseling on March 20, 2018.[77] The March 20, 2018 disciplinary notice has an "x" mark next to "written" for action being taken, but the January 8, 2019 final written warning indicates that the prior disciplinary action issued was a preventative counseling. No witness testified about this discrepancy except that Weding was asked on cross-examination why the disciplinary process skipped from preventative counseling to final written warning. Weding could not provide an explanation (Tr. 1779–1780). The two documents show that progressive discipline was not skipped as the March 20, 2018 discipline indicated a level 2 written warning while the January 8, 2019 disciplinary action indicated a level 3 final written warning.

January 28, 2019: Termination

On January 15, 2019, Weding received a patient complaint that Sambrano was rude (Tr. 1771, 1773). Weding stated that he was informed that Sambrano was acting rudely regarding a bowl of cereal which caused the patient to become upset (Tr. 1758). Weding testified that he spoke to the patient as well as the certified nurses' assistant regarding this incident.[78] Thereafter, Weding sent an email on January 18, 2019, to Irwin regarding the patient complaint (R. Exh. 59).[79] Weding also relayed in the email that when he asked Sambrano about the incident, she denied being rude and stated that she sent the cereal (Tr. 1771).[80] Weding testified that Gregg and human resources determined that Sambrano should be terminated but that he prepared the termination action along with supporting documentation (Tr. 1769–1770; R. Exh. 59).

Thus, on January 28, 2019, Respondent terminated Sambrano for rude behavior; the prior day, Sambrano passed out union flyers (Tr. 261, 717; GC Exh. 20).[81] At the meeting to present the termination to Sambrano, Sambrano and Adamson attended along with Weding, Gregg and Irwin (Tr. 719–720). Sambrano testified that Respondent alleged that a patient and a "worker" claimed that she was rude to a patient and refused the patient cereal (Tr. 720). Sambrano disputed the allegations that she was rude to a patient and refused the patient cereal. She testified that the dietary staff received complaints every day because patients are upset when they do not

[76] Gregg did not testify.

[77] On March 20, 2018, Weding issued Sambrano a written counseling for rude and disrespectful behavior towards a security officer and house supervisor on March 15, 2018 (GC Exh. 20). Sambrano testified that she called the security officer to unlock the manager's office to turn down the heater for the dietary office (Tr. 739). The security officer and house supervisor came down to the dietary office and accused Sambrano of being rude to the security officer and for yelling that the security officer was taking too long to come down to the dietary officer (Tr. 739). Sambrano admitted calling the security officer several times but denied yelling at him (Tr. 739). Thereafter, both the security officer and house supervisor made written complaints about Sambrano's behavior (Tr. 742).

[78] Weding did not recall many of the details regarding this incident and the investigation including what statements the patient made about Sambrano's conduct (Tr. 1784). Weding testified that he likely spoke to Sambrano the same day he received the complaint and spoke to the nurse and patient (Tr. 337, 1775–1776).

[79] This document was renumbered as R. Exh. 59, not General Counsel's exhibit as the transcript states (Tr. 1766–1768, 1829–1830).

[80] In this email, Weding wrote that the certified nurses' assistant would document the patient's complaint, but the statement was not submitted or included in the disciplinary file (Tr. 1774).

[81] The General Counsel alleges in the complaint that Sambrano was suspended on January 25, 2019, but there was no evidence presented at the hearing despite the General Counsel's posthearing brief claims (GC Br. at 184).

get the food they want. Sambrano denied being involved with the patient, did not speak to the patient, the patient was not on her assigned floor, and there was no video footage of her talking to the patient. Sambrano further countered that the patient could not have identified her by her full name because her name badge only has her first name, and the "worker" who identified her never spoke her name (Tr. 720–721). Sambrano also disputed the claim that her handwriting was on the late tray for this patient. Sambrano claimed that later Respondent alleged that the complaint was not written, but only verbal (Tr. 722–723). During this meeting, Sambrano alleged that Weding fabricated the complaint to get rid of her (GC Exh. 34; Tr. 262–266, 335–336, 340).

At a second meeting on April 24, 2019, regarding her termination, Sambrano was represented by Miguel Canales. Canales asked for written documentation, but Irwin allegedly said that they would refer them to Respondent's attorneys (Tr. 723–724). Irwin's notes provide summaries of the questions asked by Canales and Weding's response. Essentially, Weding informed Canales that if a patient has a complaint when they cannot have a specific food item, the diet clerk should refer the issue to the nurse or doctor to tell the patient what they cannot have due to diet restrictions. According to the notes, Weding said if he gets a patient complaint that an employee is rude, he speaks to the patient, take a patient statement, and investigates. During this meeting, Irwin's notes indicate that Sambrano does not recall taking the patient's phone call. But Weding says that Sambrano told him she did speak to the patient.

*Credibility*

I cannot credit Sambrano's testimony that she was not rude and discourteous to the IT help desk employee as well as the patient. Previously, when Weding had only started working at Respondent, Weding disciplined Sambrano for similar conduct. Less than 1 year later, during a short period, Sambrano was again accused of rude and discourteous behavior. During both instances, Sambrano claimed innocence but her testimony appeared self-serving and insincere. Sambrano's failure to take any responsibility for these two incidents undermines the integrity of her testimony. Weding's testimony was corroborated by Irwin's notes as well as the disciplinary actions, despite his failure to recall many of the facts from these incidents. Thus, I rely instead upon the documentary evidence for these actions. These documents are inherently more reliable that poor memories and embellishing testimony.

*Legal Analysis*

At complaint paragraphs 7(b)(18), 7(e)(3) and 7(h)(2), the General Counsel alleges Respondent violated Section 8(a)(3) and (1) of the Act when Sambrano was disciplined on January 8, 2019, suspended on January 25, 2019, and terminated on January 28, 2019. CGC alleges that Respondent disciplined and terminated Sambrano because of her protected concerted union activity (GC Br. at 181). CGC further argues that Respondent's discipline of Sambrano on January 8, 2019 as a final written warning rather than a written warning applied the disciplinary "strange[ly]" indicating animus (GC Br. at 83–184). CGC argues that Sambrano's termination after her hand billing participation is "suspicious" and based on animus (GC Br. at 184). Respondent argues that Sambrano did not engage in protected concerted activity, and even if so, had no knowledge of the activity and the termination was based on legitimate reasons (R. Br. at 13–14).

Sambrano engaged in protected concerted and union activity when she wore her union button to work, passed out hand bills, engaged in a group complaint in the summer of 2018, and advised employees on their rights under the expired CBA. Furthermore, I find that Respondent knew about her union and protected concerted activity. But there is no evidence that Weding, or any other dietary department official knew about Sambrano's hand billing participation the day before she was terminated.

Next, I will evaluate the General Counsel's theory that animus towards Sambrano's protected concerted union activity was a substantial or motivating factor in Respondent's treatment of Sambrano. While Sambrano engaged in protected concerted activity, the General Counsel has failed to prove that January 8, 2019 final written warning and January 28, 2019 termination was motivated by Section 7 animus. I have previously discredited Sambrano's testimony that Weding questioned her and a coworker about employees complaining about scheduling. Thus, prior to her final written warning, Sambrano's significant union activity occurred during the summer of 2018 when she attended a group meeting to discuss a grievance to complain about scheduling. Although Sambrano disputes the allegations in the January 8, 2019 final written warning, such an incident is not surprising considering her discipline on March 20, 2018, for similar conduct. This complaint also arose from the IT employee and his supervisor, not from Weding or Gregg. CGC argues that Respondent skipped a step in progressive discipline when issuing Sambrano a final written warning, but the documentary evidence shows that in March 2018, Sambrano was issued a step 2 written counseling, not a level 1 preventative counseling, as misidentified in the January 8, 2019 disciplinary action; thus, Respondent did not bypass progressive discipline.

Soon thereafter, Sambrano again engaged in rude conduct towards a patient. Weding credibly testified that he spoke to the patient and the certified nurses' assistant. While the certified nurses' assistant told Weding she would submit a statement, no statement was provided or produced in the disciplinary action. I do not find this missing statement to indicate animus as I credited Weding's testimony that based on his investigation, Sambrano acted rudely to the patient. Moreover, there is no indication of animus towards Sambrano's protected concerted activity. Article 7.01 of the expired CBA provides that employees may be discharged without prior discipline for discourtesy toward a patient. Furthermore, the investigation into the January 15, 2019 incident had commenced by January 18, 2019, which is well before the hand billing event of January 27, 2019. Finally, there is no evidence that Respondent suspended Sambrano on January 25, 2019.

The General Counsel has failed its burden to prove that Respondent's actions were motivated by Sambrano's Section 7 activities. Thus, I dismiss complaint paragraphs 7(b)(18), 7(e)(3), and 7(h)(2).

### G. *8(a)(5) and (1) Allegations: Changes to Working Conditions*

At complaint paragraph 7(i), the General Counsel alleges that Respondent made 20 changes to employees' working conditions from July 2018 to June 5, 2019. CGC argues that Respondent admitted to making all the changes alleged without providing the union notice and an opportunity to bargain and changed the terms and conditions of the expired CBA (GC Br. at

190–196). Counsel for Respondent does not concede that any changes were made, and that if changes were made, they were de minimis (R. Br. at 21–23). As discussed below, these allegations will be grouped by topic. Generally, the parties failed to give any specific arguments for their positions.

*Legal Framework*

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.*, 343 NLRB 385 (2004). A subject is considered a mandatory subject of bargaining as defined in Section 8(d) of the Act which includes wages, hours, and other terms and conditions of employment. Wages are a mandatory subject of bargaining. *Purple Communications*, 370 NLRB No. 26 (2020). A unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

In addition, after a CBA expires, an employer has a statutory duty to maintain the status quo on mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse in negotiations. See *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999). The substantive terms of the expired agreement generally determine the status quo. See *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). The Board may also consider any extracontractual past practices that are "regular and long-standing, rather than random or intermittent." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). Neither contract coverage nor waiver doctrines apply following the expiration of a collective-bargaining agreement. *Nexstar Broadcasting, Inc., d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 2–4, 8 (2020) ("[P]rovisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration").

1. July 2018: Varied Assignment Sheets, Duties No Longer Listed on Assignment Sheets, and Assignment Sheets in Respondent's Office; and August 2018: Varied Bid Sheets, Stations No Longer Named on Bid Sheets (Complaint Paras 7(i)(1) and (2))

In the EVS department, if an employee seeks to change his position, work hours and days, or areas assigned, the employee must sign a bid sheet, completed by EVS management, within 72 hours of positing when the desired position, time or area opens (Tr. 74, 227, 301, 668, 1141, 1276–1277, 1475). These bid sheets fall into two categories: a classification bid or a promotional bid (Tr. 453–454). A promotional bid is when an employee moves from one job classification to another while a classification bid is when an employee moves from one shift or station to another (Tr. 272, 1277–1278).

The bid sheet indicates the date posted, the area of the hospital the bid is for which is known as the duty number, the position title which is the job classification, the work schedule, and the shift. The duty number typically states the duty station, which is a particular area of the hospital where the employee would be assigned. Employees place their names on the bid sheet if

interested in the bid along with their job classification and hire date (GC Exh. 28 and 29). Once an employee is selected which is based on seniority, a manager notes to whom the bid is awarded and start date (Tr. 223, 1141).[82]

In mid-2018, the bid sheets no longer specified the duty station except for the emergency department and surgical services.[83] The bid sheets now stated that the duty station "varies" (Tr. 625–626, 1090–1091, 1160, 1279, 1464, 1520; GC Exhs. 28, 29). Smith testified that in April 2018 McKinnon proposed during CBA negotiations that the duty station on the bid sheets would indicate "varies" for future bids, but the parties did not reach an agreement and the Union did not agree to the change (Tr. 628–629, 631). Smith testified that keeping the location static for employees ensured that the employees consistently kept up their area (Tr. 631). Wong testified that after employees complained about not knowing how to clean an area, McKinnon and the managers began training the employees on cleaning throughout the facility (Tr. 1092).

McKinnon admitted that he changed the location of assignment on the bid sheets from specific locations to "varies" after the position was vacated by an employee (Tr. 71, 1280–1281, 1457). McKinnon explained that Respondent needed to change the bid sheets due to nepotism and the need to "clean" up duty stations (Tr. 1283). McKinnon justified his actions by explaining that the employees' workloads were not equally distributed based on employee complaints and management observations (Tr. 1283, 1530). McKinnon testified that when he was hired to replace Sodexo management, he tried to gain flexibility in the locations for where employees were assigned to cleaned (Tr. 1280). McKinnon testified that they would receive calls from facility staff to clean a room, the employees would refuse because the rooms were not in that employees' station. Furthermore, McKinnon testified that the bid sheet duty stations used areas that were not defined by Respondent, but rather by Sodexo (Tr. 1457). Thus, McKinnon did not know where the duty stations were, and Sodexo did not tell them during the transition (Tr. 1457, 1523–1526). McKinnon also stated that when he spoke to the shop stewards about the meanings of some of the station numbers, the responses would be inconsistent (Tr. 1526–1527).

McKinnon claimed that the Union via Pike in 2018 or 2019 approved these changes but admitted he did not come to an agreement until he had implemented the new bid sheets (Tr. 1281, 1469–1470, 1529). McKinnon testified that Pike told him that existing bids could not be changed, but future bids would not be an issue under the expired CBA (Tr. 1282, 1467, 1522). McKinnon testified that he also spoke to Canales three times about the need to change future bid

[82] Seniority is divided into two types: house and classification. House seniority is an employees' hire date at Respondent. Classification seniority is the date that the employee first went into the position (Tr. 271–272).

[83] Although not alleged as a violation in the complaint, in mid-2018, the bid sheets changed in where they could be found at the facility (GC Exhs. 28, 29, and 61; Tr. 224, 1460). Prior to mid-2018, the bid sheets had been placed on an employee bulletin board outside the EVS office in the basement where employees could sign the bid sheet at any time within the 72-hour period per expired CBA article 20.04(b) (Tr. 1286). However, in May 2018, the bid sheets were placed in a glass bulletin board, and employees had to ask managers to sign for that bid or ask the manager to remove the bid sheet so the employee could sign it (Tr. 623–625, 667, 1278, 1284). Smith also testified that employees no longer had enough time to sign the bid sheets since the managers were not often found in the basement (Tr. 667–668). Smith testified that Respondent did not notify the Union of the change in location of the bid sheet. McKinnon testified that employees could sign the bid sheet during the huddle and throughout their shift they could contact management who held copies of the bid sheet (Tr. 299–300, 1284–1285, 1474–1475). McKinnon testified that Respondent changed the location of the bid sheets due to accusations by employees that employees would remove signed names from the bid sheet.

stations, but McKinnon also testified that he spoke to Canales after the change occurred (Tr. 1282, 1529).

*Credibility*

Here, I credit Smith's testimony that the Union did not agree to the change despite McKinnon's claims to the contrary. McKinnon claimed that the Union agreed but his testimony cannot be believed as many employees testified about the changes to the bid sheets. It is therefore unlikely that the Union agreed to the change. Regardless, McKinnon also testified that he made these changes prior to the Union agreeing.

*Legal Analysis*

McKinnon admitted that he changed the locations of the positions to varies rather than a specific area of the facility. Scheduling of work and its location are mandatory subjects of bargaining. The witnesses testified about the impact of these changes where employees needed additional training. Respondent presented no evidence of impasse. As this change is more than de minimis, contrary to Respondent's argument, Respondent had an obligation to provide the Union with notice and an opportunity to bargain when changing a status quo. Thus, Respondent violated Section 8(a)(5) and (1) as described in complaint paragraph 7(i)(2).

However, the General Counsel presented no evidence to support the allegation at complaint paragraph 7(i)(1) where it is alleged that in July 2018 Respondent changed the assignment sheets to varied, the duties were no longer listed on the assignment sheets, and the assignment sheets kept in the EVS office. Thus, complaint paragraph 7(i)(1) is dismissed.

2. September 2018: Changing Schedules and Break Times (Complaint par. 7(i)(3))

Prior to McKinnon's hiring by Respondent, employees in the EVS department took their breaks approximately 2 hours after their start time, a lunch break approximately 4 to 6 hours after their start time, and a last break a reasonable amount of time before the shift ended. But these times were flexible due to facility needs (Tr. 922). Per the parties' expired CBA at article 17.02 and 19.06, EVS employees are given a 30-minute break, which begins no earlier than 3 hours after the start of a shift and no later than 5 hours after the start of a shift, and two 10-minutes breaks during their shifts (one prior to the 30-minute break and one after) (GC Exh. 4).

McKinnon testified that when he began working at Respondent, the managers and he identified two issues with employee breaks during the day shift: (1) employees would take their breaks in groups but employees at the facility complained about calling for discharge rooms to be cleaned and seeing 5 to 6 employees in the cafeteria; and (2) employees would take breaks outside the period set forth in the expired CBA (Tr. 1287). McKinnon explained that he then posted the expired CBA article on meals and break periods, and then in 2018 or early 2019 created a break schedule based on the employees' stations/areas (Tr. 921–923, 1093–1094, 1287). McKinnon testified that the meal and break times were flexible at times such as when the number of patients in the hospital was lower than typical (Tr. 1095, 1482). This document he created had to be signed by the employees daily and was attached to their daily assignment sheet (GC Exh. 30; Tr. 1093, 1106, 1289, 1480–1482).

McKinnon testified that he believed he followed the expired CBA, and that he had "communication with Martha [Pike] and Miguel [Canales]" to ensure that the Union agreed to such procedures for breaks and mealtimes (Tr. 1293, 1538). McKinnon claimed that Pike informed him that employees complained about not taking their breaks, and Pike supported bringing meal and lunchtimes within the limits set forth in expired CBA (Tr. 1293–1294). McKinnon also admitted that the Union did not agree to such changes in writing, but these issues were discussed during bargaining for a new CBA, and that Varela did not "have any resistance on it" (Tr. 1294).

*Legal Analysis*

McKinnon admitted that he created a document which set forth specific times for employees to take their breaks. This change in the break times is more than a de minimis change. While McKinnon may have justified business reasons for the change, Respondent was required to maintain the status quo and follow the expired CBA which did not have specific times, nor did it have limits on the number of employees who could take their breaks at once. No matter any discussions McKinnon may have had with various union representatives, there is no evidence that Respondent and the Union reached any agreement on break times. Scheduling breaks is a mandatory subject of bargaining and the Respondent provided no evidence of impasse. Therefore, Respondent violated Section 8(a)(5) and (1) of the Act.

3. September 2018: Employees Cannot Be in Basement Prior to Clocking into Work (Complaint par. 7(i)(4))

In September 2018, Judge testified that McKinnon changed the employees' clock-in times where previously employees could clock in to work up to 7 minutes before the start of their shift to only a few minutes to clock in before the start of the work shift. Judge testified that McKinnon did not want to employees to go to the basement early (Tr. 1147). Judge explained that prior to this change, the employees could come to the basement prior to their shift to put away their personal belongings including their purses and lunches (Tr. 1147). Irwin testified that employees may clock into work up to 7 minutes before the start of a work shift and may wait in the cafeteria or common areas prior to the start of the shift (Tr. 232–233). Irwin also exclaimed that employees were "encourage[d]" not to be in the work area prior to their shift due to shift changes (Tr. 233). McKinnon did not testify about this allegation and the expired CBA is silent on this issue.

*Credibility*

As discussed previously, Judge appeared to be a credible witness who was testifying against her pecuniary interests. No witness from Respondent contradicted Judge's testimony, and Irwin only explained that employees were encouraged not to come to the work area prior to the shift due to the transition period.

*Legal Analysis*

Respondent again violated Section 8(a)(5) and (1) of the Act when McKinnon announced that employees could not come to the basement prior to their work shift. Judge credibly testified

that employees would come to the basement prior to their shift to prepare to start working. Although Irwin testified that employees could clock into their shift seven minutes prior to the start, Judge testified that McKinnon changes this policy to only a few minutes before their shift. I find that this change is more than de minimis. Moreover, as this changed a past practice, Respondent was required to give notice to the Union as well as an opportunity to bargain. Again, Respondent failed to fulfill its obligation before making this change in working conditions. Thus, Respondent violated Section 8(a)(5) and (1) of the Act.

4. November 1, 2018: Refusing to Abide by Article 12.06 Vacation Scheduling (Complaint par. 7(i)(5))

Section 12.06 of the expired CBA covers employee vacation (GC Exh. 4; Tr. 488–490). This section provides that on the first workday in November of each calendar year, Respondent shall post a calendar for employees to use in selecting their preferences for vacations for the following calendar year. This calendar shall be posted until January 1. The calendar should show for each week the minimum and maximum of employees per classification who will be allowed to take vacations that week. The employees also should use the facility's vacation request form. Employees may after January 1, with generally 30 days advance notice, select vacation any week where the maximum number of employees are not already approved for leave

Judge testified that in the past, the employees could look at the vacation calendar outside the EVS office to check to see if the date they wanted was available, and then the employee would request the leave even if the employee had not yet accrued the leave but would do so by the date of the requested leave (Tr. 1151–1152). In about September 2018, Respondent no longer posted leave calendar outside the EVS office, and employees needed to go into the EVS office to view the calendar (Tr. 1152).

McKinnon testified that Respondent places the calendar in the secured bulletin board and places a copy on the table where the employees can complete a leave slip request (Tr. 1300, 1487–1488). McKinnon testified that he created a vacation leave request form because he had not seen a form used by the employees, and Sodexo failed to provide any documents used by the employees (R. Exh. 85: Tr. 1300–1302, 1486). The vacation schedule is kept on the managers' computer (Tr. 375). Only employees who are on vacation that week of work are posted in the glass enclosed bulletin board. McKinnon testified that he did not see a vacation schedule posted when he began working for Respondent (Tr. 1487).

*Credibility*

Since Judge testified in a consistent and detailed manner, I credit her testimony that employees could no longer view the vacation schedule without going into the EVS office. In contrast, I do not credit McKinnon's testimony that the vacation schedule was posted on the bulletin board and where employees could complete vacation leave slips.

*Legal Analysis*

Specifically, the General Counsel argues that Respondent stopped posting the vacation schedule as required by the expired CBA. I disagree with the General Counsel's characterization

of the credited facts. Here, I credit Judge's testimony that in September 2018, employees could no longer view the vacation calendar. However, the expired CBA indicates that Respondent is required to post the *following* year's calendar from November 1 to January 1. After January 1, the vacation calendar no longer must be posted. Thus, the General Counsel's argument that Respondent removed the calendar in September 2018 which is a violation of the expired CBA terms is not accepted as the CBA is silent on this issue. Furthermore, any posting of a calendar in November 2018 would be for the following year, not the current year. Hence, Respondent did not violate the Act as alleged.

5. November 2018: No Longer Allowing Employees to Carry Water Bottles on Their Carts and Go to Nurse's Station for Water (Complaint par. 7(i)(6))

In November 2018, Millet told the employees during a huddle meeting that they could no longer carry their water bottles on their carts (Tr. 1200). Prior to Millet's announcement, employees would carry their water bottles on their carts (Tr. 1157). Millet told employees to drink water at the nurses' station or kitchen (Tr. 1158). Judge admitted that Respondent maintained a rule for years that employees could not have personal items in the carts, but the employees were only reminded about the rule recently (Tr. 1200–1201). Respondent has had a rule in effect, due to OSHA regulations, that employees may not keep food, drink, or personal items in the housekeeping carts (Jt. Exh. 2).

*Legal Analysis*

The General Counsel has not proven that Respondent violated Section 8(a)(5) and (1) of the Act regarding the water bottle on the housekeeping cart. The evidence demonstrates that employees had been informed of the rule, but that the enforcement, prior to McKinnon's arrival, was lax. The General Counsel did not present any evidence that Respondent permitted employees to carry their water bottles on their carts, and then McKinnon decided to change a past practice. Respondent by enforcing this rule did not change employee's working conditions but reminded them of the rules in the facility. Thus, this complaint allegation is dismissed.

6. November 2018: Adding New Kitchen Tasks, Such as Rolling Silverware into Napkins (Complaint par. 7(i)(7))

Sambrano testified that in 2018 her work changed where she had extra floors and surveys assigned to her and was told that if the tray line workers did not finish rolling the silverware, they would all be responsible, and Weding would check the cameras (Tr. 712–713, 750–751). Weding testified that it was tray line employees' job duties to roll silverware, not Sambrano's job duties (Tr. 333). Sambrano testified that she and her co-workers complained to Weding that the dietary employees had to pick up soiled menus from patients without being provided gloves (Tr. 713–716). Sambrano testified that before her termination she spoke to a woman from infection control about the soiled menu, but she was terminated before she was able to provide her a copy of the menu (Tr. 716).

*Credibility*

I do not credit Sambrano's testimony that rolling silverware was added to her job duties. This testimony does not make logical sense due to her job duties and the likely job duties of a tray worker. Furthermore, Sambrano's testimony appeared to not be entirely truthful as she seemed to testify only in her self-interest. Weding, on the other hand, appeared to be a reluctant participant in these proceedings but despite his attitude, his testimony appeared more truthful because he admitted to making mistakes and could not recall many events which is logical considering he no longer works at the facility.

*Legal Analysis*

Since I do not find Sambrano credible, I dismiss this allegation in the complaint. Even if I credited Sambrano's testimony such a change was not shown to be a significant change.

7. November 30, 2018: Refusing to Abide by Article 5.03 Union Stewards (Complaint par. 7(i)(8))

Article 5.03 of the expired CBA states:

> The Union may select trained Union Stewards from among the employees who may act as Union representatives, or may assist Union representatives in Grievance and Arbitration proceedings and the discussion with the Employer's designated representatives of questions or concerns regarding the Employer's work practices and procedures, provided that a designated Union official provides the Union Steward and the Employer's designated representative with specific written authorization permitting the Union Steward to engage in such activity. The Steward shall not engage in the authorized activities described above on paid work time, unless authorized by the Employer's designated representative. No employee shall participate in meetings, discussions or other activities with the Steward while the employee is on paid work time, unless specifically agreed to by the Employer's designated representative. Stewards engaged in activities authorized by the Union shall comply with the obligations imposed upon authorized Union representatives by Article 5 of this Agreement. There will be a sufficient number of Union Stewards to be available to employees on all shifts. The Union will provide the Employer with a list of Union Stewards in January of each year and provide updates the first week of each calendar quarter or as otherwise necessary, and a full list twice a year.

*Legal Analysis*

The General Counsel argues that in late 2018 and into 2019, Respondent chose employees other than Smith to represent employees during meetings. Based on the evidence in this matter, I do not find that the General Counsel has proven that Respondent refused to abide by article 5.03. Both McKinnon and Irwin testified that they had not received any list of stewards from the Union. When McKinnon chose other employees to attend meetings, he credibly testified that he thought that Walker continued to be a union steward. Smith testified that Walker

did not complete union training, but the General Counsel did not prove that Respondent was aware that Walker was not a representative. Furthermore, some employees chose other employees to be their representative which Respondent honored. As such the General Counsel has not proven that Respondent declined to maintain the status quo and abide by article 5.03.

8. December 2018: Assigning Employees Additional Tasks Not on Their Bids; January 20, 2019: Assigning New Tasks of Floor Stripping and Waxing; and April 2, 2019: Resuming Assigned Stripping and Waxing Duties to Employees Who Did Not Bid for This Work (Complaint pars. 7(i)(9), (13), (17))

*Legal Analysis*

The General Counsel failed to specifically address this allegation in the brief. To the extent the General Counsel claims that the December 2018 and April 2, 2019 allegation refers to McKinnon's assignment of floor care duties to Vazquez, I cannot find that such an addition to her work duties constitutes a significant change. The expired CBA makes clear that housekeeping attendants would be responsible for floor care duties. Furthermore, the position description provided to Vazquez provides for floor care as her assigned duties. As for the January 20, 2019 assignment of additional duties allegations, I can find no evidence in this record. Thus, regarding these complaint paragraphs, the General Counsel has failed to prove that Respondent did not maintain the status quo with the expired CBA and violated the Act.

9. December 3, 2018: Refusing to Follow Article 9.01 Prohibited Discrimination (Complaint par. 7(i)(10))

Article 9.01 of the expired CBA provides that there shall be no discrimination by Respondent or the Union against any employee because of membership or nonmembership in or activity on behalf of the Union.

*Legal Analysis*

The General Counsel argues that Respondent's actions towards employees who engaged in Section 7 activity shows that Respondent refused to follow article 9.01. As found within this decision, Respondent violated the Act for some allegations, and in other allegations, the General Counsel did not prove its case. Respondent has never changed or refused to follow article 9.01. Thus, this complaint paragraph is dismissed.

10. December 3, 2018: More Closely Following FMLA Attendance Issues (Complaint par. 7(i)(11))

The only testimony about FMLA attendance issue on or about December 3, 2018, concerned Ruiz. To reiterate, on December 3, 2018, Blake issued Ruiz a preventative counseling for attendance as well as for tardiness and early clock out from her work shift (GC Exh. 3). Ruiz testified that she had been approved for intermittent FMLA leave during this time (Tr. 934). The record contains no evidence of this FMLA approval.

*Legal Analysis*

As alleged as an 8(a)(5) and (1) allegation, the General Counsel has not presented any arguments in support of its claims. I can only speculate that this allegation concerns the preventative counseling issued to Ruiz on this same date. But I am unclear as to how that incident violated Section 8(a)(5) and (1) of the Act. Since the burden of proof lays with the General Counsel, who has not proven this alleged unilateral change, I dismiss this complaint paragraph.

11. January 8 and 9, 2019: Designating Certain Employees to "Back of the House" Restriction (Complaint par. 7(i)(12))

On January 8, 2019, McKinnon told Porchia he did not want the employees to be "going to the back of the house anymore" (Tr. 1002). Porchia testified that she had never heard that term before but thought that McKinnon seemed to be referring the admitting area where she had been. McKinnon told her that if she comes in early for her shift, she should go straight to the cafeteria (Tr. 1002).

On January 9, 2019, Smith, Thorne, and McKinnon attended a meeting in Thorne's office to discuss the disciplinary action Smith received the day before. During this meeting, Smith asked Thorne if she could come into the facility earlier than 10 minutes prior to her shift due to the bus schedule. McKinnon told Thorne that Smith could not "go to the back of the house." Smith testified that McKinnon told her in approximately June 2018 that "back of the house" was anywhere in the facility aside from the cafeteria (Tr. 680, 689). Prior to June 2018, Smith had no limitation on where she could go in the facility and during what times she could be at the facility (Tr. 690).

*Legal Analysis*

As alleged as an 8(a)(5) and (1) allegation, the General Counsel has not presented any arguments in support of its claims. It is unclear from the complaint and the testimony how Respondent "designated certain employees" to "back of the house." While the evidence shows that McKinnon restricted employees' access to the facility for their breaks, this allegation does not state as such. Thus, the burden of proof lays with the General Counsel, who has not proven this alleged unilateral change, and I dismiss this complaint paragraph.

12. January 28, 2019: Refusing to Abide by Article 7.01 Cause for Discharge (Complaint par. 7(i)(14))

Article 7.01 of the expired CBA provides that after the completion of the probationary period, employees may not be terminated except for just cause. This section also lists specific examples of employee actions which could result in termination without prior discipline. The section provides that an employee may be terminated for patient complaints, which shall be documented by the written patient complaint or oral complaints documented contemporaneously. Also, Respondent agrees to include the Union in the investigation. The General Counsel alleges that Respondent did not follow this provision when refusing to include the Union in the investigation.

*Legal Analysis*

Based on the record, it appears that Respondent did not include the Union in the investigation prior to terminating Sambrano. However, I do not find that this one incident indicates that Respondent declined to follow the status quo and follow the terms of the expired CBA. This one incident does not prove a violation of Section 8(a)(5) and (1) of the Act.

13. February 2019: Refusing to Abide by Article 21 Grievance Process (Complaint par. 7(i)(15)

Article 21 provides for grievance and arbitration. The complaint alleges that in February 2019, Respondent refused to abide by the grievance to arbitration process in Article 21. The General Counsel argues that Respondent is required to continue the terms and conditions of the expired CBA by processing grievances. CGC in their brief relies upon the testimony of Varela and Flood (GC Br. at 196).

Varela testified that since the expiration of the CBA, only a few grievances have been resolved. The grievances that have been resolved include issues surrounding FMLA and overtime (Tr. 497). During Varela's testimony, she said:

> The cases that have arisen after the expiration of the agreement, there's been I think 60 or so grievances filed. I think some are still in process, going through those steps with the grievance process. But other than those, I'm not aware of others that have resolved. But I have not reviewed each of the 60 or so grievances in the files to confirm that. […] Not all of them have been sent to arbitration (Tr. 497).

The record contains evidence that some grievances were processed such as in February 2018 (GC Exh. 39). Varela further stated that no grievances have gone to arbitration since the expiration of the CBA as the right to arbitration expires with the contract expiration (Tr. 497).

Flood testified that in February 2019 Adamson told her that the "Union wasn't taking any grievances and the Hospital" (Tr. 897). Flood testified that Adamson told her that "we couldn't do the grievances" (Tr. 897). Adamson, who testified, was not asked any questions about this conversation with Flood.

*Legal Analysis*

In *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139, slip op. at 3 (2019), the Board stated:

> It is well established that an employer's unilateral change in contravention of the *Katz* doctrine violates Section 8(a)(5) of the Act. However, the Board has always recognized exceptions to the *Katz* unilateral change doctrine, permitting or requiring the cessation of certain contractual obligations upon contract expiration. These include contract provisions for no-strike/no-lockout pledges, *arbitration*, management rights, union security and dues checkoff (emphasis added).

Here, CGC embellished the testimony of Flood and Varela to make the claim that Respondent completely refused to abide by article 21 (GC Br. at 196). Instead, the direct testimony of Varela shows that Respondent processed grievances but that few had been "resolved." Resolving a grievance does not equate to Respondent's disregard of article 21. Furthermore, Flood only testified that Adamson told her that the Union and Respondent were not taking grievances as of February 2019. While the record shows that subsequent grievances were filed, Adamson's comments to Flood cannot lead to the conclusion that Respondent has refused to follow article 21. Furthermore, emails from Irwin to Union representatives in 2018 and 2019 prove that Respondent continued to process grievances (GC Exh. 39). Finally, Varela also credibly testified that some grievances had been resolved while others had not, and that the grievances were at various stages.

Thus, the General Counsel has not proven that Respondent refused to abide by article 21 of the expired CBA. This complaint paragraph is dismissed.

14. February 15, 2019: Changing Attendance Points (Complaint par. 7(i)(16))

Again, the General Counsel offers no specific argument as to this allegation, and thus the General Counsel has not sustained his burden of proof. However, to the extent the General Counsel argues that Irwin changed Vazquez' attendance points on about February 11, 2019, I do not find that Respondent made a material, substantive and significant change to employees' working conditions. This allegation is dismissed.

15. May 2, 2019: Instituting a New Uniform Policy and May 2, 2019: Refusing to Abide by Article 20.01 Probationary Period (Complaint pars. 7(i)(18) and (19))

As discussed previously, Respondent has had a policy concerning employee dress code which has been in effect since October 12, 2009 (R. Exh. 83). However, Judge and Villalobos credibly testified that this policy was not enforced for many years until May 2019 when McKinnon and the EVS managers began enforcement. During this discussion, Judge credibly testified that McKinnon told the employees that they were all on probation.

*Legal Analysis*

Although Respondent's dress code policy had been in effect for several years, Respondents did not enforce the dress code policy. Thus, the past practice of permitting employees to have facial piercings, which was at issue for Judge and Villalobos, is considered a regular and long-standing past practice which requires Respondent to give the Union notice of the implementation and an opportunity to bargain the effects. Thus, Respondent violated Section 8(a)(5) and (1) when the dress code policy was enforced. However, I do not find that McKinnon changed article 20.01 of the expired CBA which provides that an employee will be considered probationary until he has completed 45 shifts of work after his most recent hiring by Respondent. Thus, I dismiss this allegation.

16. June 5, 2019: Requiring Notification of Work Issues to Be in Writing (Complaint par. 7(i)(20)

As alleged as an 8(a)(5) and (1) allegation, the General Counsel has not presented any facts or arguments in support of its claims. As such, I only have the complaint allegation which does not offer any arguments of persuasion to me. Thus, the burden of proof lays with the General Counsel, who has not proven this alleged unilateral change, and I dismiss this complaint paragraph.

*H. 8(a)(5) and (1) Allegations: Union Access*

At complaint paragraphs 8(d) through (f), the General Counsel alleges that on January 8, 2020, Respondent changed the access for Union's representative, limiting them to the basement and main floor; on June 29, 2020, Respondent changed its hospital visitation policy to a No Visitor Policy; and on July 7, 2020, Respondent denied a Union representative access to the facility.

Article 5.01(a) of the expired CBA states:

> Authorized representatives of the Union shall be permitted to visit the Employer's establishment for the purpose of communicating with employees and supervisors regarding Union business, provided that such visits by Union representatives shall not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours. Union representatives must also notify Human Resources (during normal business hours) or the Hospital Supervisor (after hours) upon arrival and departure from the facility. Union representatives will be required to report to the Emergency Department Security post or the PBX/Communications and sign in; Union representatives will wear identification while on the premises of the Employer.

On either January 6 or 8, 2020, Adamson went to the facility to meet with employees in the cafeteria. However, before meeting with the employees, Adamson used the restroom on a patient floor of the facility due to the restroom on the first floor being cleaned. In the elevator, Adamson ran into Blake and Millet, who observed Adamson getting off on a patient floor at tower 3 (GC Exh. 32).[84] Adamson testified that when he would visit the facility, he would obtain his pass from human resources and would be able to go "wherever" he needed to meet employees (Tr. 1242). On cross-examination, Adamson admitted that he would only go to the other floors to use the restroom and would meet employees in the basement or cafeteria (Tr. 1256).

[84] Adamson's testimony slightly differs from the testimony of McKinnon as well as contemporaneous notes and emails. Adamson testified that he visited the facility on the second floor on January 8, 2020, while the notes and emails indicate that he visited the facility on the third floor on January 6, 2020, and that he was spoken to by Irwin about where he was limited in visiting with employees at the facility on January 8, 2020. I do not rely upon Adamson's testimony since McKinnon and Thorne testified consistently with their contemporaneous notes and emails.

McKinnon reported to Thorne and Irwin that Millet had seen Adamson on the third floor of the facility as they were not certain if Adamson was permitted on a patient floor, so they wanted human resources to be aware. Irwin then emailed McKinnon and Millet along with Thorne asking questions about what Adamson was doing on the third floor. Irwin wrote, "Next time he comes in I will remind him he cannot be in work areas. That he needs to talk to staff in beak [sic] areas. i.e., the café or basement. Please let me know where you saw him and if he interferes with work being done" (GC Exh. 32). Irwin then cited to article 5.01 of the expired CBA. Later that day, Thorne emailed Schmid and Cassard asking if they were okay with Irwin contacting Adamson to ensure he is following the expired CBA where he cannot contact employees during work time or interfere with their work since there are no break rooms our lounges for housekeeping or dietary on the third floor. Cassard approved the contact.

The next day, Thorne instructed Irwin to contact Adamson to find out what he was doing on the third floor. After Irwin contact Adamson, she emailed Thorne on January 8, 2020, writing, "I just spoke with Kenny, I asked why he was on the 3rd floor, because there is not a break room for EVS or Dietary. He got very agitated and said he had the right to walk the floors. When I told him he needed to be in EVS or Dietary break areas or public areas he got very upset and said, now I have to tell you when I have to go to the restroom. Then he stormed out of the office" (GC Exh. 32). Thorne replied that if Adamson was in areas of the facility, he should not be that security should be contacted.

Then on January 8, 2020, Thorne replied to McKinnon that she understood Adamson was on the nursing floors earlier in the week, and because employees could be working on those units "he could not be meeting with them unless they were on work time" (GC Exh. 32). Thus, they need to ask him to leave the area and contact security if necessary.

Six months later, on June 30, 2020, Thorne emailed Canales about Respondent's decision to "reestablish" the no visitor policy immediately due to an increase in COVID-19 patients and hospital capacity (GC Exh. 23). Thorne forwarded her email to Adamson on July 14, 2020. Thorne testified that Respondent did not speak to the Union about ending their access to the facility (Tr. 188). Prior to and during the COVID-19 pandemic, union representatives could come to the facility (Tr. 252, 1250–1251). On about July 7, 2020, Adamson went to the facility despite being told by Canales that Thorne had told the Union no visitors would be permitted (Tr. 1247–1248). Thorne then told Adamson he could not come into the facility due to the coronavirus restrictions (Tr. 1249).

*Legal Analysis*

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when on about January 8, 2020, it changed access for union representatives to the facility, limiting the representatives' access to the basement and main floor; about June 29, 2020, it implemented a no visitor policy at the facility; and about July 7, 2020, denied a union representative access to the facility. CGC argued that union access survived the expiration of the CBA where there is no limitation on where a union representative may go in the facility, union visitation is a mandatory subject of bargaining which Respondent failed to provide notice to the Union and an opportunity to bargain (GC Br at 196–202). Counsel for Respondent only addressed the no visitor policy in its posthearing brief alleging that Respondent's core purpose

and mission is patient care, and the COVID-19 pandemic required the modification (R. Br. at 23–24).

Although the parties' CBA expired, article 5.01(a) which specifies union access to the facility is a term and condition of employment that survives the CBA's expiration. See *T.L.C. St Petersburg*, 307 NLRB 605, 610 (1992), enfd. 985 F.2d 579 (11th Cir. 1993); *Ernst Home Centers*, 308 NLRB 848, 848–849 (1992). This access is a mandatory subject of bargaining which cannot be unilaterally changed. *Meadowlands View Hotel*, 368 NLRB No. 119 (2019). Respondent limited access to the facility by union representatives by confining the areas where they could meet to the EVS or Dietary break areas or public areas, not only to the basement and main floor of the facility as alleged in the complaint. Previously per the expired CBA, union representatives could visit the facility if they did not interfere with the conduct of Respondent's business or with the performance of work by employees during their working hours. Rather than determine whether any violation of the CBA occurred, Respondent assumed that Adamson was interfering with the work performance of employees and limited access to the facility. Any change in the access to an employer's property for a union representative is a clear violation of Section 8(a)(5) and (1) of the Act. See *Desert Springs Hospital Medical Center*, 369 NLRB No. 16, slip op. at 2 (2020). Thus, Respondent violated the Act as alleged in about January 2020.

Furthermore, on June 30, 2020, Thorne informed Canales that the facility would reestablish the no visitor policy immediately.[85] Respondent informed the Union representative of the change without giving the Union notice and an opportunity to bargain. Such a decision also affects the employees' right to access to their statutory representative. While the COVID-19 pandemic has caused many health measures to be placed especially at hospitals, the COVID-19 pandemic does not excuse Respondent from fulfilling its obligation to provide notice and opportunity bargain to the Union. Respondent violated Section 8(a)(5) and (1) of the Act by changing its facility visitation policy which applied to union representatives. Finally, based on the same legal analysis, by denying Adamson access to the facility on July 7, 2020, Respondent also violated Section 8(a)(5) and (1) of the Act.

## CONCLUSIONS OF LAW

1. Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center (Respondent) is, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act as well as has been a health care institution within the meaning of Section 2(14) of the Act.

2. Culinary Workers Union, Local 226 a/w Unite Here International Union (Charging Party or the Union) is, has been at all times material, a labor organization within the meaning of Section 2(5) of the Act, and represents the following bargaining unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> The Employer (Respondent) recognizes the Union as the exclusive collective bargaining representative for the Employer's employees working under the

[85] The record is unclear as to when the no visitor policy was originally established as Adamson testified that he had never been limited in his ability to enter the facility even after the COVID–19 pandemic began (Tr. 1250–1251).

Union's jurisdiction and working those job classifications listed in Exhibit 1 attached to and made part of the expired CBA. Exhibit 1 Classification: Baker, Cafeteria Dish-up, Cafeteria Lead Person, Cashier, Cook's Helper, Cook Trainee (first 45 days), Cook (after 45 days), Cook II, Dietetic Clerk, Dishwasher/Dish Machine Operator, F.S. Tray Worker, Floor-stock/Kitchen Runner, Griddle Cook (first 45 days) (Cafeteria only), Griddle Cook (after 45 days) (Cafeteria only), Housekeeping Attendant II, Kitchen Porter, Lead Attendant II, Lead Porter, Linen Attendant, Pantry Worker, and Utility Attendant

3. Respondent violated Section 8(a) (1) of the Act on November 12, 2018, by threatening to discharge union representative Sherrill Smith unless she remained silent during an investigatory meeting, silenced the union representative Sherrill Smith which conveyed futility to employees to select the Union as their bargaining representative, and required a union representative Sherrill Smith to remain silent which effectively denied employee Andrew Pietanza a representative during an investigatory meeting.

4. Respondent violated Section 8(a)(1) of the Act in November 2018 when Respondent announced that employees cannot speak to the Union steward during Respondent's time.

5. Respondent violated Section 8(a)(1) of the Act on December 17, 2018, when denying employee Oilda Vazquez a union representative during a meeting, which was still held, in which she reasonably believed would result in discipline.

6. Respondent violated Section 8(a)(1) of the Act on January 24, 2019, by its director of human resources and security guards, who are agents of Respondent, when they engaged in surveillance and interrogated and threated employees when they were hand billing, and orally promulgated an overly broad rule.

7. Respondent violated Section 8(a)(1) of the Act on March 20, 2019, when denying employee Oilda Vazquez a union representative of her choice, who was available, during a meeting, which was still held, in which she reasonably believed would result in discipline.

8. Respondent violated Section 8(a)(1) of the Act on May 2, 2019, when orally promulgating an overly broad rule prohibiting employees from complaining about Respondent's dress code policy, that it would be futile to complain to human resources, threatening employees with closer supervision, and threatening employees with discharge.

9. Respondent violated Section 8(a)(3) and (1) of the Act on December 18, 2018, when unlawfully subjecting Sherrill Smith to closer supervision, disciplining her and closely supervising her on January 8, 2019, and terminating her on February 3, 2019.

10. Respondent violated Section 8(a)(5) and (1) of the Act in August 2018 when the bid sheets were unilaterally changed to varied duty stations; in September 2018 when the employees' break times and schedules were unilaterally changed, in September 2018

when unilaterally not allowing employees in the basement of the facility prior to their work shift, and on May 2, 2019, when unilaterally enforcing the dress code policy.

11. Respondent violated Section 8(a)(5) and (1) of the Act on about January 8, 2020, when limiting the union representative's access to the facility to the basement and main floor of the facility, unilaterally changing the Union's access to the facility on June 29, 2020, and denying the union representative access to the facility on July 7, 2020.

12. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondent has not violated the Act in any of the other manners alleged in the complaint.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(3) and (1) by disciplining and terminating employee Sherrill Smith, Respondent must offer her full reinstatement to her former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered because of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Smith for her reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate Smith for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016) and *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, file with the Regional Director for Region 28 a report allocating backpay to the appropriate calendar year(s), and a copy of Smith's corresponding W-2 form(s) reflecting the backpay award. The Regional Director for Region 28 will then assume responsibility for transmitting the report and form(s) to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent also shall remove from its files any reference to the final written warning of January 8, 2019, and termination of February 3, 2019, of Smith and to notify her in writing that this has been done and that the final written warning and termination will not be used against her in any way.

Also, having found that Respondent violated Section 8(a)(5) and (1) by changing the terms and conditions of employment for its unit employees without first notifying the Union and giving it an opportunity to bargain, I shall order Respondent to rescind the unlawful unilateral changes it made, upon request from the Union. Furthermore, having found that Respondent violated Section 8(a)(5) and (1) by limiting access to the facility for the union representative, changing access to the facility for the union representative, and denying access to the Union representative to the facility without first notifying the Union and giving it an opportunity to bargain, I shall order Respondent to rescind the unlawful unilateral changes it made.

I will order that the employer post a notice at the facility in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id. supra at 13.

The General Counsel requests that I order that the notice be read aloud and that an explanation of rights accompany the Board notice (GC Br. at 203–206). The Board has recognized that notice reading is an extraordinary remedy where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 868 (2014). Although there are several violations of the Act, including one employee discipline and termination, I do not find this matter to be widespread and egregious to rise to the level of requiring a notice reading.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[86]

## ORDER

Respondent, Valley Hospital Medical Center, Inc. d/b/a Valley Hospital Medical Center, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Threatening to discharge a union steward unless the union steward remained silent during an investigatory meeting, silencing a union steward which conveyed futility to employees to select the Union as their bargaining representative, and requiring a union steward to remain silent which effectively denied an employee a representative during an investigatory meeting.

   (b) Announcing that employees cannot speak to the union steward during Respondent's time.

[86] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Denying an employee, a union steward during a meeting, which was still held, in which the employee reasonably believed would result in discipline.

(d) Engaging in surveillance and interrogation, and threating employees when they were hand billing, and orally promulgating an overly broad rule.

(e) Denying an employee, a union representative of her choice, who was available, during a meeting, which was still held, in which the employee reasonably believed would result in discipline.

(f) Orally promulgating an overly broad rule prohibiting employees from complaining about Respondent's dress code policy, that it would be futile to complain to human resources, threatening employees with closer supervision, and threatening employees with discharge.

(g) Unlawfully subjecting an employee and union steward to closer supervision, disciplining, and closely supervising the employee and union steward and terminating the employee and union steward.

(h) Unilaterally changing the bargaining unit employees' terms and conditions of employment including changing the bid sheets to varied duty stations; the employees' break times and schedules; not allowing employees in the basement of the facility prior to their work shift and enforcing the dress code policy which had been unenforced previously.

(i) Limiting the Union representative's access to the facility to the basement and main floor of the facility, unilaterally changing the Union's access to the facility and denying the union representative access to the facility.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the orally promulgated, overly broad rules of prohibiting employees from speaking to the union steward during Respondent's time and prohibiting employees from complaining about Respondent's dress code policy.

(b) Within 14 days of the date of the Board's Order, offer Sherrill Smith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Sherrill Smith whole for any loss of earnings and other benefits suffered because of the discrimination against her, in the manner set forth in the remedy section of this decision.

(d) Compensate Sherrill Smith for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s) for her, and a copy of Sherrill Smith's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days of the date of the Board's Order, remove from its files any reference to the unlawful final written warning and the termination, and within 3 days thereafter, notify Sherrill Smith in writing that this has been done and that the final written warning and the termination will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Rescind, upon request from the Union, the following changes to the bargaining unit employees' terms and conditions of employment including changing the bid sheets to varied duty stations; the employees' break times and schedules; not allowing employees in the basement of the facility prior to their work shift and enforcing the dress code policy which had been unenforced previously.

(h) Rescind the following changes: limiting the union representative's access to the facility to the basement and main floor of the facility, unilaterally changing the Union's access to the facility and denying the Union representative access to the facility.

(i) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[87] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by Respondent, and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily

[87] If the facility is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility is closed due to the Coronavirus Disease 2019 (COVID–19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Respondent customarily communicates with its employees by electronic means. *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68, slip op. 4 (2020). If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since November 1, 2018.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., December 22, 2021

Amita Baman Tracy
Administrative Law Judge

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten to discharge a union steward unless she remains silent during an investigatory meeting, silence the union steward which conveys to you that selecting the Union as your bargaining representative is futile, and requiring a union steward to remain silent which effectively denied an employee a representative during an investigatory meeting.

WE WILL NOT prohibit you from speaking to the Union during "our time."

WE WILL NOT deny an employee a union representative during a meeting, which was still held, when the employee reasonably believed she would be disciplined.

WE WILL NOT engage in surveillance and interrogation and threats to employees when you are hand billing, and WE WILL NOT promulgate an overly broad rule.

WE WILL NOT deny an employee a union representative of the employee's choice, who is available, during a meeting where the employee reasonably believed discipline would result.

WE WILL NOT prohibit you from complaining about the dress code policy, convey to you that complaining about the dress code policy to human resources would be futile, threaten to closely supervise you and threaten you with discharge.

WE WILL NOT subject the union steward to closer supervision, discipline, and termination.

WE WILL NOT unilaterally change your terms and conditions of employment such as changing the bid sheet duty stations to varied, changing your break times and schedules, not allowing you in the basement as was permitted in the past prior to your work shift, and enforce the previously unenforced dress code.

WE WILL NOT limit the union representative's access to the basement and main floor of the facility, change the union representative's access to the facility, and deny the union representative access to the facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL recognize and, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.

WE WILL rescind the overly broad rules of prohibiting employees from speaking to the union steward on "our time," and prohibit employees from complaining about the dress code.

WE WILL rescind, upon request from the Union, any changes to the bargaining unit employees' terms and conditions of employment including varied duty stations on the bid sheets; employees' break times and schedules; prohibiting employees in the basement of the facility prior to their work shift and enforcing the previously unenforced dress code.

WE WILL rescind limiting the union representative's access to the facility to the basement and main floor of the facility, unilaterally changing the Union's access to the facility and denying the Union representative access to the facility.

WE WILL, within 14 days of the date of the Board's Order, offer Sherrill Smith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Sherrill Smith whole for any loss of earnings and other benefits resulting from her termination, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Sherrill Smith for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for her, and a copy of Sherril Smith's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful final written warning and termination of Sherrill Smith, and WE WILL, within 3 days thereafter, notify her in writing that we have done so and that we will not use the final written warning and termination against her in any way.

VALLEY HOSPITAL MEDICAL CENTER, INC. D/B/A
VALLEY HOSPITAL MEDICAL CENTER

(Respondent)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1400 Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-234647 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 416-4755.